SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 215

ARTHUR GOODWYN BILLINGS, PETITIONER

vs.

KARL TRUESDELL, MAJOR GENERAL, UNITED STATES ARMY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

INDEX

558534—43——1

A In District Court of the United States for the District of Kansas, First Division

In the Matter of the Application of Arthur Goodwyn Billings for a Writ of Habeas Corpus, Civil 776 H. C.

1 *Petition for writ of habeas corpus*

Filed August 14, 1942

Comes now the petitioner, Arthur Goodwyn Billings, by his attorney Wm. D. Reilly and applies to the above named court and to the Honorable Richard J. Hopkins, Judge thereof, for a writ of habeas corpus and represents to said court and Judge that said petitioner is being restrained of his liberty by Lieutenant Colonel C. L. Malone, Commanding Officer, Reception Center, United States Army, Ft. Leavenworth, Kansas.

Your petitioner further respectfully represents that he is not a member of the armed force of the United States and that he is not subject to military jurisdiction and that if he has violated any laws they are the civil laws of the United States and he is entitled to be heard in the civil courts in that he is not subject to military law.

Wherefore, your petitioner prays that a writ of habeas corpus be directed to Lieutenant Colonel C. L. Malone, Commanding Officer, Reception Center, United States Army, Ft. Leavenworth, Kansas, or to any of his subordinates, directing them to bring your petitioner, Arthur Goodwyn Billings, into and before the honorable United States District Court for the District of Kansas, and that they be ordered to file in*ot* this honorable court any and all instruments or pretended process or authority under which they seek to restrain and hold your petitioner from his liberty.

Wm. D. Reilly,
Attorney for Petitioner,
Leav., Kansas.

State of Kansas,
Leavenworth County, ss:

Arthur Goodwyn Billings, of lawful age, being first duly sworn on oath deposes and states that he is the petitioner
2 in the above entitled court and cause, and that he has read the above and foregoing Petition and the statements and allegations therein contained are true.

Further affiant saith not.

Arthur Goodwyn Billings.

Subscribed and sworn to before me this 13th day of August A. D. 1942.

[seal]

Ann Rapp,
Notary Public.

My Comm. Expr: June 26, 1943.

[File endorsement omitted.]

3 In United States District Court

[Title omitted.]

Order Issuing Writ of Habeas Corpus

(Filed Aug. 15, 1942)

Now on this 15th day of August 1942 the duly signed and verified petition of Arthur Goodwyn Billings has been presented to me, Richard J. Hopkins, Judge of said United States District Court for the District of Kansas whereby it is alleged that Arthur Goodwyn Billings, petitioner herein, is about to be illegally taken into custody without due process of law, and from said petition it appears to me that writ of habeas corpus ought to issue;

It is therefore considered, ordered, adjudged, and decreed that a writ of habeas corpus issue out of and under the seal of the Clerk of the United States District Court directed to Lieutenant Colonel C. L. Malone, Commanding Officer, Reception Center, United States Army, Ft. Leavenworth, Kansas, or his agents or representatives commanding him, or they, to have the body of the said Arthur Goodwyn Billings before me in the United States District Court at Leavenworth, Kansas, on the 18th day of August A. D. 1942 at 10 o'clock A. M. of said day to do and receive what shall then and there be considered and ordered concerning the said Arthur Goodwyn Billings together with the time and cause of his detention, and that he have then and there the said writ.

In witness whereof, I have hereunto set my hand this 15th day of August 1942.

RICHARD J. HOPKINS, *Judge.*

[File endorsement omitted.]

4 In United States District Court

Write of habeas corpus and return

(Filed Aug. 26, 1942)

The PRESIDENT OF THE UNITED STATES OF AMERICA to MAJOR GENERAL KARL TRUESDELL IN LIEU OF LIEUT. COLONEL C. L. MALONE, *Commanding Officer, Reception Center, United States Army, Fort Leavenworth, Kansas, Greeting:*

You are hereby commanded that you have the body of Arthur Goodwyn Billings, petitioner, restrained of his liberty, as it is said, together with the day and cause of his being taken and detained, before the Honorable Richard J. Hopkins, Judge of the District Court of the United States, for the District of Kan-

sas, First Division, at the court room in the Federal Building, in Leavenworth, Kansas, on Tuesday, August 18, 1942, at 10:00 o'clock A. M., and then and there submit to and receive whatsoever the said Judge shall then and there consider, and you shall then and there have this writ.

Witness the Honorable Richard J. Hopkins, United States District Judge, at Topeka, Kansas, this 15th day of August 1942.

HOWARD F. MCCUE, *Clerk,*
United States District Court.
[SEAL] By NELLE CLOUGH, *Deputy.*

UNITED STATES MARSHAL'S RETURN

I hereby certify and return that on the 17th day of August 1942, I received the within writ at Kansas City, Kansas, and executed the same by delivering personally to the within-named Major General Karl Truesdell, a true and certified copy of this writ with all endorsements thereon at Fort Leavenworth, Kansas, on August 17th, 1942.

W. M. LINDSAY,
United States Marshal.
By JOSEPH P. REGAN,
Deputy United States Marshal.

Fees and costs: $4.80.
[File endorsement omitted.]

5 In United States District Court

[Title omitted.]

Respondent's return to writ of habeas corpus

Filed Aug. 18, 1942

To the Judge of the District Court of the United States for the District of Kansas, First Division:

The respondent, Major General Karl Truesdell, United States Army, upon whom has been served a writ of habeas corpus for the production of the body of Arthur Goodwin Billings, respectfully makes return and states that he holds the said Arthur Goodwin Billings by authority of the United States as a soldier in the United States Army under the following circumstances:

That the said Arthur Goodwin Billings was duly inducted as a soldier in the service of the United States at Fort Leavenworth, Kansas, on or about August 13, 1942, for a term of the duration of the war and six months.

The said Arthur Goodwin Billings has been placed in confinement and formal charges have been preferred against him for wilful disobedience of a lawful command of his superior under Article of War 64, a copy of which charge, and of the order under which said Arthur Goodwin Billings is held in confinement, duly certified and verified, are hereto attached; and that he will be brought to trial thereon as soon as practicable before a Court-Martial, to be convened by the Commanding General of the Seventh Service Command, SOS, United States Army, Omaha, Nebraska.

In obedience, however, to the said writ of habeas corpus, the respondent herewith produces before the Court the body of the said Arthur Goodwin Billings, and for the reasons set forth in this return, prays this Honorable Court to dismiss the said writ.

KARL TRUESDELL,
Major General, U. S. Army.

Dated August 18, 1942.
Received a copy Aug. 18, 1942,

WM. D. REILLY,
Atty. for Petitioner.

[File endorsement omitted.]

6 *Certified copy of charges preferred against Private Arthur G. Billings and order for his confinement*

HEADQUARTERS RECEPTION CENTER 1773

FORT LEAVENWORTH, KANSAS

AUGUST 14, 1942.

Subject: Confinement of Enlisted Man.
To: Provost Marshal, Ft. Leavenworth, Kansas.

Request that Private Arthur G. Billings, 37217409, Induction Station, unassigned, Ft. Leavenworth, Kansas, be confined at the Post Guard House under the 64th Article of War.

JESSE T. STOCKS,
2nd Lt., Inf., Officer of the Day.

Charge: Violation of the 64th Article of War.

Specification: In that Private Arthur G. Billings, A. of U. S., Unassigned, having received a lawful command from 1st Lt. Godfrey B. Nemec, Infantry, his superior officer, to affix his fingerprints to an induction record, did at Fort Leavenworth, Kansas, on or about August 13, 1942, willfully disobey the same.

I hereby certify that the foregoing is a full and true copy of the original charges preferred against Private Arthur G. Billings,

A. of U. S., Unassigned, and of the original order for his confinement, and that the same are in the usual form of military charges, and that such charges and order conform to the rules regulating military procedure.

EDWARD,
Asst. Adjutant General.

Sworn to and subscribed before me this 17th day of August 1942.

ALLAN R. BROWNE,
Captain, JAGD, Staff Judge Advocate.

[File endorsement omitted.]

7 In United States District Court

[Title omitted.]

Petitioner's reply

Filed Aug. 18, 1942

Comes now the petitioner and in reply to the Response filed herein by Major General Karl Truesdell, United States Army, denies that he was duly inducted as a soldier in the service of the United States at Ft. Leavenworth, Kansas, on or about August 13, 1942, for the term of the duration of the war and six months.

Petitioner states further by way of his Reply that he is a conscientious objector and that as such conscientious objector he filed with his local Selective Service Board his conscientious objections to service in the armed forces of the United States and that said board overruled his objections and classified him as 1A for army service;

That upon receipt of the decision of the local Selective Service Board at Delphos, Ottawa County, Kansas, that he appealed said decision to the state appeal board and said state appeal board denied said appeal;

That he did not present himself at said local Selective Service Board but did present himself to the Reception Center, Ft. Leavenworth, Kansas, and that at the time he was asked to take the oath of induction he refused to take said oath; that he was commanded to stand at the time said oath was about to be given, which he refused to do; that he remained seated and that during the giving of said oath he was restrained of his liberty by the officers of the United States Army on duty at said Reception Center and that several officers were asked to be present in a small office at said Reception Center, the exact number of officers this petitioner is unable to state, and that against his will, and without

his consent the oath was read and he was then asked if he subscribed to said oath, which he refused to do informing said officers that he was a conscientious objector.

8 Wherefore, Your petitioner asks that the court grant this writ of habeas corpus ordering his release from the custody of Major General Karl Truesdell, United States Army, and that he be ordered into the custody of the United States Marshal for the District of Kansas in accordance with the provisions of Section 11, The Selective Training and Service Act of 1940 of the United States Statutes.

[File endorsement omitted.]

A. G. Billings,
Petitioner.

By Wm. D. Reilly,
Attorney for Petitioner.

9 In the District Court of the United States for the District of Kansas, First Division.

[Title omitted.]

Statement of Evidence

Hearing had before the Honorable Richard J. Hopkins, judge of the above entitled court, without a jury, at Leavenworth, Kansas, Tuesday, August 18, 1942.

Appearances

The petitioner was present in person and by his attorney, William D. Reilly, of Leavenworth, Kansas.

Respondent was represented by Honorable Lester Luther, Assistant U. S. District Attorney, of Topeka, Kansas, and by Captain Allan R. Browne and Lieutenant W. H. Edwards, both of the Judge Advocate General's Department, Leavenworth, Kansas.

The parities having announced ready, the cause proceeded as follows:

10 *Colloquy Between Court and Counsel*

Mr. Reilly: I have a reply to the response I would like to file.

I have gone over the petition here, if the Court please. The question in this matter, your Honor, is whether or not under the Selective Service Act of 1940, the petitioner is amenable to trial. It is recognized that he has violated the Selective Service Act.

The Court. He admits that he has?

Mr. Reilly. He admits that he has refused to take the oath of induction, refused to do service in the army. The question

is whether under the Selective Service Act of 1940, he is subject to trial by a court martial under the military authority or whether he is subject to trial in the civil courts in the United States District Court. Would the court rather hear the evidence first and then I have some points of law I would like to argue?

The COURT. Yes, I think we will hear the evidence. Do you wish to make a statement?

Opening Statement for Respondent

Captain BROWNE. I should like to; yes, sir. I think it will develop that the principal point before you is just a question of whether the army has taken—under the law is entitled to the custody of this petitioner Billings, whether they have gone far enough in the procedure under the Selective Service Act so that the civil authorities have ceased to act and the military
11 have begun. I have just read his reply to the respondent's return and I notice from that reply that apparently under their view, we would be entitled to a judgment on the pleadings. I should like, if I may, to reserve that oral motion until such time as your Honor is ready to receive it, but the issues will resolve into this: at what point does the Selective Service Act under which we now operate, the Act of 1940, take a man from the civil jurisdiction and put him in the military jurisdiction? We contend that that is all decided by what are called the Articles of War, which are the law of the land, and are found in Title 10, Section 1473 of the United States Code Annotated which I have here, and particularly this one paragraph which, if you don't mind, I will read since it is very short, as I think it goes to the very nub of it. "The following persons are subject to these articles and shall be understood as included in the term 'any person subject to military law,' or 'persons subject to military law whenever used in these articles:' * * * all officers, members of the army nurse corps, warrant officers, army field clerks, members of the quartermasters corps and soldiers belonging to the regular army of the United States; all volunteers from the dates of their muster or acceptance into the military service of the United States," that is this man, "and all other persons lawfully called, drafted or ordered into," ordered into, "or to duty or for training in the said service from the dates they are required," and here is the date he was
12 talking about, "from the dates they are required by the terms of the call, draft or order to obey the same." That is the nub of our position, your Honor. "From the dates they are required by the terms of the call to obey the same." He was required to appear August 13th. He was a conscientious objector, he said, and he registered as such. He followed the procedure

set out by the Selective Service Act by asking for a hearing by the draft board where he lived in Minneapolis, Kansas. He got that hearing. He was denied his alleged rights as a conscientious objector. In other words, the Board found against him. He still followed the law and appealed to the Board. That appeal board heard him fully, we must presume, and denied it. He sets that up in his return, in his reply. They denied he was a conscientious objector under the law, which requires that he must be an objector because of religious training and not personal conviction—but religious training, and that means, as I see the law, that he was finally denied that. A finding of fact was made that he was not a conscientious objector, which is binding on our state courts if the Board has jurisdiction. His next move was that he came up here to take the physical examination. We have a written statement from him, and the evidence no doubt will show that he did take the physical examination hoping that he would be rejected because of defective eyesight, still following the law, you see. However, his eyesight was not sufficiently poor to reject him, and he was accepted, much to his chagrin and surprise according to his statement. So then the next
13 move was for the oath to be read to him. Of course, under our contention he was in from the time of the date that he was due to answer the call, which he did himself voluntarily. He was asked or ordered to stand—the terms make no difference in this proceeding. He was asked to raise his hand and he refused to raise his hand or to stand. The oath was read to him then and at the conclusion of the oath, he said he did not subscribe to it. The Selective Service Act, I think, mentions the oath, but it gives the President the authority to make rules and regulations, your Honor. Under those regulations, inductees are inducted, and one of the regulations that the President made through the Secretary of War—of course, he acts through him in all these military matters—was that, anticipating this sort of a thing, if an inductee refused to subscribe to the oath, that that was of no importance; that he would then be notified he was in the army anyway and he was in the army, so that procedure was followed by the officers charged with the induction here. Other things followed. He was ordered to be fingerprinted which he refused, and which things I think are not material in this particular hearing. That is the statement I wish to make.

Mr. REILLY. Since the Captain has gone ahead and given his position and quoted the Articles of War, I think the Captain will concede the Articles of War he is contending upon were passed, I think, in 1920. Is that true?

Captain BROWNE. They have never been replaced,

Mr. REILLY. That is right.

Captain BROWNE. I don't recall the date. I have it here.

Mr. REILLY. I think they were passed prior to 1940.

Captain BROWNE. June 4, 1920.

Opening Statement for Petitioner

Mr. REILLY. 1920, that was my idea, and I think the Articles of War as so drafted at that time, had in mind the Selective Service Draft Act of 1917, which provides among other things in Paragraph 202 of the Act as follows: "All persons drafted into the service of the United States and all officers accepting commissions in the force herein provided for, shall from the date of said draft or acceptance, be subject to the laws and regulations governing the regular army." That was the 1917 draft, and I think the two outstanding decisions cited in connection with the draft of 1917, are the cases of Franke vs. Murray and Ex parte Therut. Franke vs. Murray was a decision in which former circuit Judge William Hook of this particular district sat as a presiding judge, and there is a provision there in which they hold from the time a man is notified he is in the draft that he is then subject to military law, and they quote that particular paragraph of the Selective Draft Act of 1917. But, your Honor, the Selective Service Act of 1940, omits all of that and no place do we find in the Selective Service Act, or have I been able to find in the Selective Service, what they call the Selective Training and Service Act of 1940, such provision. It does, however, and I want to call your attention to the paragraph in the 1917 Act, the part that deals with offenses and punishment. When you get down to the punishment, it says: it goes on to say, "who if he shall fail or neglect fully to perform any duty required of him in the execution of this Act shall, if not subject to military law," I take it that would apply to members of the Draft Board and the Appeal Board, "Shall be guilty of a misdemeanor and upon conviction in a District Court of the United States having jurisdiction thereof, be punished by imprisonment of not more than one year or if subject to military law, shall be tried by the court martial and suffer such punishment as a court martial may direct." That is 1917. Now then, we go over to the Training and Service Act of 1940, and in Paragraph 311, which is shown here in Title 50 of the United States Code Annotated, it goes on and says, "shall upon conviction in the District Court of the United States of America having jurisdiction thereof, be punished by imprisonment of not more than five years or a fine of not more than ten thousand dollars or both such fine and imprisonment, or if subject to military

or naval law, may be tried by court martial, and upon conviction shall suffer such punishment as the court martial may direct." Then is this added, the following sentence: "No person shall be tried by any military or naval court martial in any case arising under this Act unless such person has been actually inducted for training and service prescribed under this Act, or unless he is subject to trial by a court martial under the law in force prior to the
16 enactment of this Act. Precedent shall be given by the Courts to the trial of such cases arising under this Act." Our contention is that his induction is not complete despite the fact there may be an army regulation that he does not have to subscribe to the oath. Our contention is that he is not inducted until he does subscribe to that oath, and until he does, it is the old army phrase which we all knew in the last war, until we put up our hand and said "I do," we weren't under the military and he was still amenable to the civil laws of the United States. Now, that is the point in the case all through. I have drawn the petitioner's application for a writ hastily, but I have attempted to set forth the main facts; that he did not subscribe to the oath, did not complete his induction; the reading of the oath was under duress; he was alone; there were a number of officers present and while I think the evidence will show he had already contacted an attorney, that the army did not wait for the attorney to arrive there, but proceeded in the presence of a number of officers to read this oath to him and give him these various commands.

The COURT. Why had he contacted an attorney, may I inquire?

Mr. REILLY. He at the time announced that he was a conscientious objector and they gave him permission to call the United States District Attorney and in his conversation the United States District Attorney mentioned the names of several
17 lawyers in this community.

The COURT. Of whom you were one.

Mr. REILLY. (Continuing.) And somehow or other I was one and he selected me. As to what he thinks is a conscientious objector, that has nothing to do with me, but I feel that Congress has specifically added a provision; that the substance of the rest of that particularly section is almost the same as the section of 1917; that under the Act of 1917, military authority took the position that as soon as a man received his notice to report or his questionnaire or anything of that character and failed to report, the army immediately charged him with desertion and he was tried before a court martial. I think in the Selective Service Act of 1940, Congress, having those cases in mind and this opinion here that was written by Judge Trieber who was a district judge

that sat with the Circuit Court of Appeals, changed all that. In that opinion he goes on and says and he quotes that part I read a while ago; that the Selective Draft Act provides all persons drafted into service of the United States shall from the date of said draft or acceptance be subject to the laws and regulations governing the regular army. That was an appeal in which the question was up whether or not he was a deserter; that in order to be a deserter one must be actually in the military service and until he has been sworn in as a soldier, he has lost his status as a civilian.

They decided in that case under the Selective Service Act
18 of 1917 that he was a deserter from the time he was amenable to that particular law and his failure to register or his failure to fill out his questionnaire and his failure to present himself at the draft board made him a deserter, but in the 1940 Act, the Congress of the United States has seen fit to add that provision there that unless they are actually inducted, they should be tried in the United States District Court, and not before a military or naval court.

ARTHUR GOODWYN BILLINGS, the petitioner herein, called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. REILLY:

There are some preliminary questions here, your Honor. I want to go through the various stages there because there are some decisions and they are quoted in the manual of the Selective Service, where he must have exhausted his remedies before the local board before he is entitled to come into the Federal Court on a writ of habeas corpus. They are decisions to that effect.

Captain BROWNE. We can stipulate if it is agreeable with the Court that he has exhausted his remedies. In fact we urged that he exhaust his remedies.

19 The COURT. Doesn't your reply to the response set out what you have done? In other words, you allege that in answer to the rules and regulations, he registered; that he went before the Board and claimed that he was a conscientious objector. The board found against him. He appealed from that ruling and the state board found against him. He still came to Leavenworth.

Mr. REILLY. I would like the record to show as to how he came to Leavenworth.

The COURT. Yes, well, let's find out. Let me do a little questioning. All right, what is your name?

By the PETITIONER. Arthur Goodwyn Billings.

By the COURT:

Q. How old are you?

A. Thirty-one.

Q. Where is your home?

A. Well, I was teaching at the University of Texas, teaching economics a week ago, but I used to live in Delphos, Kansas, and it was there, in Ottawa County, that I registered for the draft.

Q. When did you register?

A. I registered with the first registration, but on my card I wrote at that time that I would never serve in the army and I meant that.

Q. Well, what next did you do with reference to your entering the army?

A. Well, the next, let me see. First I made up my mind
20 at the time I registered that I would go up to the point—
I asked at the time at what point one would leave civil jurisdiction and enter military jurisdiction.

Q. Who did you ask?

A. I asked the draft board and I also asked the state draft headquarters. They are all military officials in Austin, Texas.

Q. The question I want to know is what did you do?

A. Oh, yes, with regard to the draft itself, I submitted first to a preliminary physical examination and was put in Class 1-B, which is fit only for noncombatant service. Then I wanted to appeal that on the grounds of conscientious objection, but at that time there was a regulation that persons in Class 1-B could not appeal. Later on, that was repealed, but anyway in January,—then later I was put in 1-H, which was because I was over twenty-eight. Then in January of this year, January 28th, I believe it was, I came up for reclassification and I, like all the others in Class 1-B, was put in 1-A. I then was allowed to appeal the thing.

Q. That was at Minneapolis?

A. That was at Minneapolis. And they first allowed me a hearing, and I must say they allowed me to present my case. They were quite ~~, although some of~~ their attitude at first was a little malicious, I thought, they allowed me to present my views quite fairly, but the appeal agent who was also pres-
21 ent, he used to be the County Attorney in our county said at the time, well, after I had expressed my views and so on, "This is a rational conviction, not a religious conviction." My contention is that a rational conviction——

Q. I want to know what you next did?

A. Oh, I see. Then at this hearing, they didn't change their decision to leave me in 1-A, so I next appealed the case to the

Board of Appeals, and they simply reviewed the findings of the Local Board. There is no hearing actually before the Board of Appeals. However, the Department of Justice, in the case of conscientious objectors, does have the F. B. I. conduct an investigation, and they questioned a former maid of our family and a great many people in my home community and people at the University, people at Harvard University, where I had been studying, too, and then finally they called me to Wichita, Kansas, for a hearing before Mr. Charles Yankey, who is the state agent of the Department of Justice in cases involving appeals of conscientious objectors.

Q. Well, anyway, they appeared to make quite a thorough investigation of your case?

A. I believe they did make a thorough investigation, and it their impression, Mr. Yankey said, that nobody had questioned my sincerity, the sincerity of my convictions, and so forth, but he said what was question was whether the intent of the law covered an objection such as mine, under the phrase 22 "by reason of religious training nd belief," since I was by admission a free thinker on theological matters. I believe in the common sense of Christ'anity. I believe the rules that are attributed to Christ are the best rules. I am firmly convinced those are the best rules of human conduct. They were also advocated by Buddha, Gandhi, and others; but I have been very doubtful—I do not believe, frankly, that Christ was divine, but that hasn't shaken my belief in these principles which stand on their own feet, I think.

Q. Well, I take it that you have had a pretty good education?

A. Yes; I have had nine years of university and three years in the American Diplomatic Service.

Q. Nine years' university work. What do you mean by that?

A. I had four years in the University of Kansas, and two years——

Q. Did you graduate?

A. Yes.

Q. When?

A. 1933.

Q. What did you do next?

A. Then I went to the University of Paris, as I started to say, for two years, and after that I entered the American Diplomatic Service and served for three years in the American Embassy in Moscow under Ambassadors Bullitt and Davies. Then in 1938 I resigned and took four months' vacation out in China and Japan and then came back and that fall entered Harvard

University, where I studied, for the first time, economics.
23 In the past I have been planning in political science and international relations in Russian. I studied at Harvard three years, took my Masters, and passed the general examination for the Doctorate, but I haven't yet written my thesis.

Q. You have your Masters?

A. No; for the Doctors; so that I haven't my Doctorate complete, although about two-thirds of the work is done. Then I was hired by the University of Texas to teach economics, and I have been teaching there until about, oh, around—the last time a week ago Saturday.

Q. How long did you teach there?

A. Well, I started in the fall of last year. I was hired there last year.

Q. 1941.

A. Yes; I just got out of Harvard last year.

Q. Well, you are not married?

A. No; I am single.

Q. You have a mother?

A. My mother died when I was three.

Q. You have some other relatives, have you?

A. Yes; I have a father who lives in Delphos, Kansas. I have a little brother. Well, he is a year younger than I am, who is in the navy, and an older brother who lives in Minneapolis, Minn. Then I have a second stepmother. I have had two stepmothers. I have a second who lives with my father.

24 Q. They are still living—your father and your stepmother are still living?

A. Yes; they are still living.

Q. Live at Delphos?

A. At Delphos, Kansas. That is right.

Q. I take it from all you have told me that you have known what has been going on in the world the last ten years?

A. I think so.

Q. You knew of the Conquest by Japan and Italy and Germany?

A. I have seen part of it. I have been in the south of Manchuria and in Japan and China; yes, sir.

Q. You have read, have you, of the depredations committed by the Japanese?

A. I have read of those, but I think some of those reports are very much exaggerated, and I think after the war this will be admitted officially, just as it was after the last war, that many alleged German atrocities did not in fact take place.

Q. You have heard of the German atrocities in this war?

A. Yes; I have heard many alleged. I think undoubtedly some are true.

Q. You have heard of the bombing of Rotterdam?

A. Yes.

Q. And the killing of thousands of people after the surrender of that town?

25 A. I have heard of that; yes, and I think that is quite possible, because when people start war, that is wholesale murder anyway, and they are absolutely ruthless. I think perhaps our own army would be equally ruthless in bombing cities.

Q. And since they have declared war on this country, you have heard of Pearl Harbor?

A. Yes, sir; I have.

Q. And the massacre of many of our fine——

A. Yes; I have.

Q. Young men, thousands of them, without warning; and yet, at the moment, their ambassador was talking peace?

A. Yes; I think that was very treacherous on the part of the Japanese. However, I think that was not without a certain amount of provocation from their point of view, because Secretary Knox a month before had boasted that American army fliers on leave from the Army Air Corps were dropping army made bombs from army made planes on the Japanese in China. When we were fighting in Nicaragua, if Tojo had boasted that Japanese fliers were dropping Japanese made bombs from Japanese made planes on American troops in Nicaragua, I believe we would have regarded that as a perfect cause of war.

Q. Out of all this, you are rather an able-bodied young man?

A. Well, these people found I was fit only for noncombatant service, because my right eye is bad.

Q. How tall are you?

26 A. I am approximately six feet tall.

Q. How much do you weight?

A. About one hundred sixty-five.

Q. Do you have any other physical defects other than your eyes?

A. At one time in Russia, I thought that I was catching tuberculosis; and I went to a Russian clinic, and they told me that I had an enlarged heart. That was what was causing pains in my chest, but the people here don't find that. I don't know. I am not a medical authority myself. I have worked at very hard work. I used to work in a grain elevator loading cars, and I think it is quite possible that I do have an enlarged heart; but, anyway, according to the army military authorities, the only thing which they find definitely that puts me out of the combatant class is my bad right eye.

Q. Out of all your education, your experience, and the conditions existing in the world, you think you should stand by and let the Germans and the Italians and the Japs come into the country and murder our people and rape our women?

A. No, sir.

Q. And do all the other things, and you would do nothing about it; is that your attitude?

A. Sir, I do not think that that is at all the situation. I think when you meet violence with violence, then you have rape, and you are doing a lot of killing. I have seen, for instance
27 in Pekin, where they met violence just by not doing anything at all, the Japanese came in there, and there were a few Japanese around, but ninety-nine people out of one hundred went about their business as before. The Chinese police force remained in power, and so on. I don't think, sir, that is the alternative.

Q. Your theory is about that of Gandhi, isn't it?

A. More or less. It is somewhat like that.

Q. That you would do nothing about it?

A. No; I would do something.

Q. Well, you would have everybody go on a strike and would offer no physical resistance and you would even negotiate with the Japanese?

A. Yes; I believe I would, in this sense: I believe that one should recognize that these people are misguided. Gandhi, I think, has the right idea. He tells the Indian people, "The British have wronged you." "That is true, but you must not hate them. Recognize they are misguided; and in your actions towards them, don't act as if you hated them. Just refuse to cooperate." That is all he says. I think if that policy were pursued with regard to even an invading army, if there was no hatred on the part of the people into whose country they came, but, on the other hand, they made it evident every moment to every soldier that came in the country that while they had no hatred toward them, that they would just go out. I think there is enough elemental human decency in the people of all countries to do that.

28 Q. You think so, after the atrocities committed in Belgium and Holland?

A. Oh, yes.

Q. And Poland?

A. I think so.

Q. That we should just submit and become slaves?

A. I don't think——

Q. (Continuing.) To Germany and Japan?

A. Sir, I don't think that is the question, of submitting and becoming slaves to these countries. I think they should be resisted, but without hatred.

Q. How is your method of resistance?

A. What?

Q. What is your method of resistance? You think they should be resisted you say?

A. Well, I am resisting, I think, what I regard as a fascist institution in this country, the army.

Q. How are you?

A. By similar methods, by refusing to cooperate with them. They may ultimately sentence me to a firing squad, but they can't go one with that forever. They can't put all the people in a country in prison. That is why, if peaceful resistance were really tried, it would work.

Q. You are a citizen of this country?

A. Yes, sir.

29 Q. We have laws in this country?

A. Yes, sir.

Q. These laws have been made by a Congress and the President?

A. Yes, sir.

Q. You do not believe that all people should obey those laws and rules?

A. I think people should obey most of the laws, but I believe that there are limits beyond which no government, even a Democracy, has the right to go in infringing upon the rights of the individual. I believe that Congress in the War of 1812 was right when they held conscription was a form of slavery. Daniel Webster lead the debate, and it was turned down on the grounds it was a form of human slavery.

Q. Well, you do not believe that each individual who objects to a law should have the right to determine for himself whether he will obey it or not?

A. Yes; every individual, I think, has some sort of sanctum of sanctums, so to speak, where beyond—into which no law, no government, has any right to go. No government has the right to make him a slave, to make him commit murder. That is what the government is offering me to do now, to go out and shoot people, or, since I am just a noncombatant, to serve as an accomplice in the murder of people I have never even seen, whom, if I met them on the street, I might like just as well as many of the people of this country.

30 The Court. I think you gentlemen may inquire.

By Mr. Reilly:

Q. Is there anything else you wish to testify to that you have not talked about?

A. Well——

Q. Let me ask you this question: When was the first time you informed the authorities at Fort Leavenworth that you were conscientiously objecting to military services?

A. Well, I believe that the first time, although I mentioned it to the boys on the bus, I got on the bus here at the Junction, and some boys from my own county were going——

Q. By the way, did you go to Ottawa County and report?

A. No; I did not report in Ottawa County. I have, by the way, their order to report, which I tore up when I saw in what high-handed way the army authorities were acting. I tore it up in order that the army authorities could not fill it out and return it to my local draft board, as they are supposed to do. I have that here.

Q. I would like to introduce that in evidence.

(A document, torn in several strips, handed to the reporter, was marked for identification as "Petitioner's Exhibit 1.")

The Court. Very well; it will be received.

A. (By the witness.) They told me over the telephone, by the way, that they were reporting me delinquent there because I didn't show up in Minneapolis.

31 Q. By this order, what date were you asked to report at Minneapolis, Kansas?

A. On the 13th.

Captain Browne. Can we agree that the torn up order shows that it was the 12th of August 1942, at 10:45 A. M., at Minneapolis, Kansas?

A. I am sorry. I didn't see. I had forgotten what the date on the document was. If it is the 12th, it is the 12th.

The Court. You can agree on that?

Captain Browne. Yes, the 12th of August 1942, 10:45 A. M., is that agreeable?

Mr. Reilly. Yes, he was ordered to report to——

A. Minneapolis, Kansas.

Mr. Reilly. Local Board No. 1, Ottawa County, Kansas, sitting at Minneapolis, Kansas, Ottawa County, Kansas.

The Court. Just another question. Did somebody direct you to report to Leavenworth?

A. I will tell you——

The Court. Just answer my question.

A. Yes.

The Court. Who directed you to report to Leavenworth?

A. The girl who signed this thing, who is Secretary of the draft board.

The COURT. At Minneapolis?

A. At Minneapolis.

32 The COURT. Did she tell you when to report?

A. Well, she told me that the bus of people who were required to report in Minneapolis would pass through Victory Junction at such and such a time and I bought a ticket and got on the same bus.

The COURT. Anyway, you did report?

A. I did report.

The COURT. In accordance with that direction?

A. Yes, sir.

The COURT. And when did you report?

A. I reported, well, if that was the 12th, then it was the evening of the 12th, yes.

The COURT. The 12th of August?

A. The 12th of August, yes.

The COURT. Just past. Then what next happened to you?

A. Then, let me see. I went there and somebody in charge told me——

The COURT. (Interrupting.) Where did you go?

A. I went to what was the bus stop. It stopped in front of what was known as the checking station and somebody there said, "Everybody go over and find a bunk at such *at such* a place," and we walked over there to this place where the bunks were and slept there that night.

Captain BROWNE. I can't hear.

A. We slept there that night, and then we came back.

33 By the COURT:

Q. What place was this where you slept?

A. This was on the military reservation.

Q. Do you know the place? How was it designated?

A. Oh, I suppose it was a barracks or something like that.

Q. United States barracks?

A. I presume so since it was on there. There were some soldiers there and some people who had been rejected on physical examination staying there too, and they were coming up for a second physical examination. There were quite a mixture of people standing there.

Q. Anyway you slept there that night?

A. Yes, sir.

Q. Then what did you do?

A. Then the next morning they took us to breakfast.

Q. Who took you?

A. Some fellow in uniform took us to breakfast.

Q. Was he an officer of the army?

A. I think he was probably a private.

Q. Anyway he took you to breakfast. Where did he take you?

A. Well, a mess hall on the reservation. All this was on the breakfast?

Q. He took you in one of the army mess halls and you had breakfast?

A. Yes.

34 Q. Then what happened?

A. Then they took us back to the checking station, some army man, again, and there we were told to go over to such and such a place for a physical examination. I have forgotten the building, but I think it was——

Q. (Interrupting.) Did you go?

A. Yes, I went.

Q. Were you examined?

A. I went and was examined.

Q. Do you know who examined you?

A. Oh, there were lots of people there who did the examining.

Q. You mean several doctors?

A. Yes, there were several doctors who examined you, specialists in each branch, and they examined me and then, let me see, you asked when was the first time I had mentioned to one of them that I did not intend to serve in the army. That was when we came to this line. We came to the psychiatrist who investigates your mentality and he said, "Do you think you will make a good soldier?," and I said, "I will never serve in the army," and he said, "You won't?" and then asked me a few more questions and then passed me on to somebody else, and they turned me, put some drops in my eyes, dilated my pupils to make a dark room examination of my eyes. They sent me outside and told me to come back in the afternoon for this dark room thing.

Well, I came back in the afternoon. They examined my

35 eyes in the dark room and found that my right eye tested only 20/80 while for combatant service it was required that it test 20/40. That is, correctible with glasses to 20/80, so the officer, well no, then they sent me back to an office that was marked, I believe, AP or PA, something, two letters.

Q. Associated Press?

A. Yes, there I found this psychiatrist and two other doctors apparently, and they started questioning me, and they said, "You know we find in cases like this, that oftentimes people who object to serving in the army in the way you do are schizophrenics and I assured them I was not a schizophrenic, that I was very sane.

I thought I was more sane than they were and they came to the conclusion that I was not a schizophrenic, and they seemed a bit heepish about it all, but they nevertheless did. Anyway, they sent me back to Room 14 where some officer passes on the whole medical examination and he told me simply, he said, "You have been put in Class 1–B. Go back to the checking station." Well, he handed me these papers. My pupils, by the way, remained dilated. These drops keep your eyes dilated for twenty-four hours, that is, it is that long before the effect passes away entirely, so I couldn't read these papers and he said, "I–B." Formerly the 1–B's had not been drafted, and even now only a part of the 1–B's are drafted, so I hadn't known but what I was being turned down, partly because I had my suitcase in this
36 checking station, but I couldn't read these papers on account of my eyes being dilated so I went over and asked a boy there in blue overalls to read them for me and see what they said, and he said, "According to this, you have to be finger printed," and I said, "Well, just what does this fingerprinting involve? If it involves induction into the army, I shall refuse to be fingerprinted."

Q. That is what you told the boy in overalls?

A. Yes, and he said, "I don't know whether it does or not." He said, "I will take you to my superior officer." I couldn't see very well just where it was he was taking me. I had some misgivings that I had been very foolish in asking him; that I should go immediately outside and call the FBI, and have gotten outside of the military reservation right then.

Q. In other words, you thought somebody hooked you, is that what you thought?

A. Yes, I did, and so he brought me right into the lion's den with Lieutenant Nemec and Captain Milligan in the induction office and I told them I was going to refuse to serve in the army and they told me, "You are already within our jurisdiction" and that I wanted to turn myself over to the civil authorities and they said, "Just as soon as you entered this reservation you were under our jurisdiction." I said, I asked him (hiatus in notes) Lieutenant Nemec said to the Captain, "Well, now that we know he in-
37 tends to turn himself over to the civil authorities, we better put him under guard, hadn't we, to prevent him from leaving the reservation?" And Captain Milligan consented. He said he would rather put me on parole if I would guarantee I wouldn't try to turn myself over to the civil authorities, and I said I couldn't guarantee that. Then I said, "Will you allow me to phone the civil authorities from here," and Captain Milligan consented to let me phone them and I phoned first the United States Marshal, Mr. — I don't know his name.

Q. Mr. Lindsay?

A. This gentleman over here [indicating]. He talked to me over the phone in Topeka and he told me that I should call——

Captain BROWNE (interrupting). Just a moment, if I may. Of course, any testimony as to what some third party is quoted as saying by the witness is objected to as hearsay unless the rules are relaxed in this kind of proceeding.

The COURT. Oh, yes; let him tell everything he knows.

A. Then I called the United States Marshal, and he said I should call the office of the District Attorney instead. So I phoned the office of the District Attorney and told him the circumstances, told him—oh, I forgot to mention one fact. These gentlemen told me that they would order, just read the oath to me and that would definitely make me a soldier in the army whether or not I swore to it, but before they did that, they
38 did allow me to phone the District Attorney. I asked, "Is there anything I can do?" He said, "Well the thing to do in a case like that is try to get a writ of habeas corpus," and, he said, "Get a good lawyer."

Q. So you got Bill Reilly?

A. I told him that I didn't know offhand the name of any federal lawyers in Leavenworth.

Q. They are all federal lawyers here.

A. Well, are they? I didn't know that, and I asked him to mention, to recommend one and he said well, he couldn't recommend anyone. "That would be unethical." I said, "Will you please mention the names of several." He mentioned four names and Mr. Reilly's was the first so I called Mr. Reilly and Mr. Reilly asked if they couldn't stay reading this order or oath to me for twenty-four hours until this writ could be drawn, and they said nothing doing, they were going to read it right away.

Q. This army is sort of in a hurry apparently.

A. (Continuing.) And so about as soon as I hung up the receiver there, they took me over to some other offices, an officer, and talked to him and then took me back again and then Lieutenant Nemec got out this oath and he ordered me to stand up and I said I refused to stand up. I sat there. He said, "Raise your right hand," and I refused to raise my right hand, and then he read this oath, "Do you solemnly swear and so on and
39 so on." I said, "I do not. I refuse to take this oath." He says, "That doesn't make any difference, you are in the army now." After that Lieut. Nemec gave me a direct order to submit to fingerprinting and I refused to obey it. So then they ordered me off to the guard house, but before they got me to the guard house, before they got me out of the building——

Q. Sort of a high-handed practice they were putting into effect?

A. Yes, yes; before they got me out of the building, Mr. Reilly arrived with this writ.

Q. I am a little afraid you got into the wrong place. You ought to have got away from Leavenworth.

A. (Continuing.) With this application for a writ of habeas corpus and as soon as I had signed that and sent a telegram—they allowed me to send in a telegram resigning from the University. I was still teaching at summer school, you see, and as soon as I had done that, they ordered me to the guardhouse and put me in solitary confinement. The first night they allowed me to have a mattress and pillow, but no bedding, and then the next day they ordered me to put on these military clothes and I was afraid that they were trying to prejudice my case further by making it appear that I was already in the army. Then it occurred to me that since this was in prison . . . it didn't occur to me right at the moment. I refused to put on the army prison uniform, and then let me see. Oh, yes; they ordered me back into solitary confinement again in this cell and this time they took out the mattress and the pillow, refused me any communication with the outside, took away my address book, every single thing I had except my shirt and my trousers and left me all night in that cold cell without even a mattress or blanket or anything.

Q. What do you think the Germans would have done if they had had you?

A. Perhaps the same thing because they are fundamentally similar organizations, the Fascist, and the armies are fundamentally similar, I think. Anyway, the next morning they again ordered me to put on this prison outfit and I said if they would threaten me with violence I would put it on because then I could testify it was done only under duress so they threatened me with violence and I put this on.

Q. They did what you invited them to do?

A. Yes, and I put on this prison outfit and since then I have thought that probably it wouldn't prejudice me, my case to obey any order which I received as a prisoner since there is always a threat of solitary confinement. Some of the prisoners have been beaten in that prison.

Q. You say they have?

A. Yes, sir; they have.

Q. How do you know?

A. They have told me so.

Q. The prisoners?

A. I have no reason to doubt them. There are guards come through there with a little club and have threatened several times in my presence to beat the people who haven't done

what they told them. Let me see if there is anything that I should add. Oh, yes, that, so far as I knew, I made every effort. I have friends who are professors of law there at the University of Texas also, and they were rather interested in my case; and they looked up the law, and they told me——

Q. (Interrupting.) When did they do that?

A. Oh, this was last January.

Q. You were sort of getting ready for this business?

A. Oh, yes; I have expected to go to prison if I passed the physical examination. I expected to go to prison, anyway. I had made up my mind I would never serve in the army, and I would take the consequences, whatever they might be, so I had inquired from everybody whom I thought might know about the draft law. I went to the state draft headquarters at Austin, Texas. The draft headquarters are in the same city as the University, and the state officials there of the draft, who are army men, informed me that I was not in the army until or unless I took the oath of induction and take the physical examination.

Q. You know some of these officers might be mistaken as to what the law is.

A. Yes; they might be, but I take also a conscientious
42 objector newspaper, which has reported——

Q. What is the name of this paper?

A. It is called the Conscientious Objector.

Q. Where is it published?

A. At Stone Street in New York City.

Q. Who is the editor of it?

A. I believe his name is—his last name is Thomas, I believe, but I am not sure what his first name is.

Q. Do you have any copies of that paper with you?

A. I have a copy, I believe, in my suitcase, which the prison officials there at the guardhouse have taken away from me.

Q. Will you submit that to the court?

A. Certainly; I would be glad to.

Q. All right; go ahead.

A. And in this magazine they reported a number of cases. They record cases. That is mainly what the magazine is for, to inform other conscientious objectors.

Q. Well, you have been studying and working on this question then for a good many months, I take it?

A. Oh, yes; after all, it involved my whole life, my future, and everything.

Q. Did you tell some folks that you were going to take this physical examination and you thought likely you wouldn't pass, but if you did, then you were going to refuse to serve?

43 A. Oh, yes; I told many people that. Everybody knows that, in my home town, these people at the law faculty at the University, and before I came over here.

Q. Yes. Why do you seek to get into the civil courts? If you don't believe in everybody obeying the laws and the rules, why do you wish to submit your matter to any court?

A. Well, I don't know. It is sort of like Socrates drinking the Hemlock. I thought the law was unjust, but I didn't feel the call to evade it.

Q. He did not think the law was unjust, did he?

A. Yes; he though the decision of the populace in Greece to sentence him to death was unfair.

Q. But he didn't think the law was unfair?

A. Yes; he did.

Q. He thought these five hundred jurors were misguided souls, some of them, didn't he?

A. Yes; but anyway, I don't really know. I have difficulty explaining that, why I do feel that way; but I have not felt at any point that I could try to escape the law or to try to make my eyes, for instance, worse than they are.

Q. Have you ever voted at elections?

A. Yes; oh, surely.

Q. Did you vote for a congressman?

A. Yes.

Q. Did you expect him to vote to adopt laws that you
44 wouldn't abide by?

A. Well, no; and the Congressman I voted for didn't get elected, anyway.

Q. Anyhow; why do you prefer the civil courts, since there are two options? Why do you prefer the civil courts rather than the court martial of this army?

A. Well, I don't know. I have the feeling, for one thing—here is the court martial of the army: They gave me four orders, to raise my right hand and to take the oath and to submit to fingerprinting. Of all those orders, they charge me only with violation of the fourth, to submit to fingerprinting. They are afraid to admit the real issue, that I refuse to serve in the army. I think the civil courts are more objective and more fair; that they will convict me of what I am actually guilty of, for refusing to serve.

Q. From the very appearance of the thing, is this an aggregation of this court out here [indicating]?

A. Is what? What do you mean?

Q. These officers here?

A. Are they what?

Q. Are they an aggregation of what this court martial would consist of?

A. I don't know. You will have to ask them.

Q. They don't look as hard-boiled as I feel about the matter.

A. Yes.

45 Q. Maybe it would be better for you to be there than in this court?

A. I think in some ways it would be. I find some of these prisoners over there in the guardhouse—that most of them are in there for desertion or absence without leave; and many of them, although their ideas are not formulated on the matter, feel, I believe—well, some do realize that they object for more or less the same reasons I do, although they are people that it is petty things that have caused them to desert the army. I don't mind. Of course, I do mind a hard sentence, but I want to be convicted for what I am really guilty of.

Q. Of refusing to abide by the law?

A. Refusing to serve in the army; that is right; and not just a petty thing of refusing to be fingerprinted.

The COURT. Go ahead, gentlemen. I have taken up all the time.

Mr. REILLY. It is all right. I think the court has done a very fine job. How many officers were present at the time they administered the oath to you?

A. (By the petitioner.) I think about five were present at the time of the attempt.

By Mr. REILLY:

Q. About five. How large was the room you were in?

A. Oh, a rather small room. It was the room in which——

Q. (Interrupting.) A small room. Can you give us the size?

46 A. It was probably about as large as this *dias*, or this platform, where I am.

Q. Eight by twelve, or something like that?

A. Yes; twelve by twelve, maybe, and they all stood. I mean I was sitting in a chair like the Judge is here, and they were—This Lieutenant Nemec was standing over there and these other officers around him.

By the COURT:

Q. Wasn't it a little strange they should all stand and allow you to sit?

A. Well, I had refused to stand, you see, and that is what they wanted to get me for—was refusing to obey orders.

Mr. REILLY. You may examine.

Cross-examination by Captain BROWNE:

Q. I take it the answer you make as to the use of force is directed to the point of duress? You had that in mind—that you were forced to do something?

A. Well, I wasn't forced. I just sat there. I was prevented from leaving.

Q. Because, regardless of the number of officers in the room, you didn't take the oath, did you?

A. I did not; no.

Q. No violent hand was laid on you?

A. No violent hand was laid on me, but if I had attempted to leave the reservation and turn myself over to the civil
47 authorities, I am sure there would.

Q. You did not sign anything?

A. I didn't sign a single thing.

Q. So you weren't forced into that, were you?

A. No; but I was forced to sit there and listen to this oath of induction.

Q. It was unpleasant to you to listen to the oath?

A. Yes; it was. The whole procedure was unpleasant, and I would have gladly left if I had been allowed to.

Q. Aside from being compelled to stay there, you were not forced to do anything at all, were you?

A. No.

Q. Until the time you were sent to the guardhouse?

A. Not until the time I was sent? Yes; I was compelled to stay there, forcibly restrained from leaving.

Q. I say, aside from that?

A. Aside from that; no. They did not make me sign anything.

Q. All right. Now, no one forced you—that is, by direct force of any kind other than the threat of the law itself—to register with the draft board?

A. No.

Q. Did they?

A. No.

Q. No one forced you first to have a hearing with the draft board?

48 A. No; except the force of the law. There is a twenty-year penitentiary sentence for refusing to sign the card. That is quite a force.

Q. I am referring to direct force?

A. No.

Q. No one offered you direct force, forcing you to appeal?

A. No.

Q. No one forced you to come to Fort Leavenworth at the reception center to take the physical examination, directly, did he?

A. No; but I will tell you if I had known what the army was going to try to do, I would never even come up for this physical examination.

Q. I move that be stricken out as not responsive. I say no one did force you?

A. No.

Q. To come?

A. No.

Q. You came voluntarily?

A. "Voluntarily" is hardly the word.

Q. You came voluntarily to the reception center at Fort Leavenworth for the physical examination, subject to the pressure of the law, of course?

A. I wouldn't say it was voluntary. I came.

Q. No one forced you by direct force, though?

49 A. Not by direct force, only the indirect force of a twenty-year prison sentence.

The COURT. Is there a statute to that effect?

Mr. REILLY. No.

A. Somewhere I read that violations of the draft law are punishable with up to twenty years' imprisonment.

Mr. REILLY. No; five years.

A. I thought it was twenty and a ten thousand dollar fine.

Mr. REILLY. Ten thousand dollar fine and five years in prison.

A. Oh, it is only five. I thought it was twenty.

By Capt. BROWNE:

Q. The question is, but no one, by threat of physical violence, I mean direct force—you understand what I mean?

A. No; no one, by threat of physical violence; but I would not say I went voluntarily to this center.

Q. No one physically forced you?

A. No one physically forced me with a club.

Q. What do you mean?

A. Under a gun, club, or anything.

Q. When you first arrived at the reception center on the military reservation there, did anyone force you to stay the first night at the barracks where you slept?

A. Well, no; not exactly. They just herded these fellows like a bunch of cattle around, to go over to this place.

50 Q. After that first night there, did anyone force you to go to breakfast there at the government's expense?

A. No; not by physical force.

Q. You understand, of course, that I am talking about physical threats of force all the way through. You didn't pay anything for the meal or lodging?

A. No.

Q. Next morning you took the physical examination without threat of direct force from anyone?

A. Yes.

Q. Because you were expecting to fail it, weren't you—hoping, I will say?

A. "Hoping" is the word; yes.

Q. Then, to your great surprise, you did not?

A. Not great surprise.

Q. Just say "surprise"?

A. It wasn't surprise. It wasn't really surprise. I had packed all my baggage before I left the University and had written a letter of resignation stating in advance that I had failed, or that I had passed, the physical examination and had been ordered into the army and had refused and therefore would be arrested and imprisoned probably.

Q. After you had passed the physical examination, of course you were advised of that—as you said I think—advised that you were 1-B?

51 A. They said I was in 1-B. 1-B heretofore and even now only a part of the 1-B's are being drafted, so I didn't really know I was in or that they were trying to put me in. I couldn't see because my eyes had been dilated.

Q. I understand, but I am asking you what was told you?

A. Yes.

Q. Then the oath was read to you after some events happened?

A. Yes, sir.

Q. Then after it was read to you, you refused to subscribe to it, didn't you?

A. Yes.

Q. Then you were told you were in the army anyway, isn't that true?

A. That is true.

Q. Up to that time no force of any kind, physical force had been used or threatened towards you, is that true?

A. Yes. No, that is not true.

Q. What physical force had been used or threatened?

A. Well, Lieutenant Nemec had said this: "Now, we know this man intends to turn himself over to the civil authorities. I suggest that we put him under armed guard and prevent him from leaving the reservation."

Q. You had told them you intended to depart the first chance you got?

A. I certainly did.

52 Q. That is the only offer or threat of physical restraint?

A. Well, I was under their guard all the time after that.

Q. That was the only threat?

A. It was a continuous one thereafter.

Q. Wait a minute, until I finish my question. I say up to the time that you were told that you were a soldier, the only

threat of force that was given you was that you should stay there and not leave; is that true?

A. Yes; I just sat there while they were reading.

Q. Yes, sir; with reference to threats. Afterwards you were first put in the holdover?

A. Called by the prisoners in there solitary confinement, and that is what it is. It is a bare cell without a bed in there, roaches on the floor, cold, dark, no other prisoners around.

The COURT. You weren't entirely alone there, were you?

A. Yes, I was; I mean in solitary confinement. Oh, I am sorry. I didn't catch that. Yes; there was company in the form of roaches. That is right.

Q. Then next day you refused to help sweep it out as the other prisoners did; didn't you?

A. No; they ordered me into one of these prison uniforms and I refused to put it on.

Q. You also refused to cooperate?

A. No. I told them I would be perfectly willing to work
53 around there but I didn't want to give some tangible evidence that the army, since I had become convinced by that time it was a very high-handed organization, might use against me to try to prove I was now in the army, by taking my civilian clothes away from me.

Q. Isn't it true you were put in solitary confinement after you had refused to put on a uniform and to cooperate in the prison?

A. I hadn't refused to cooperate in the prison. I told them I would be glad to help.

Q. The uniform is the one other prisoners wear?

A. That is right.

Q. It is fatigue trousers and a shirt?

A. Yes, and has a big "P" on the back.

The COURT. What is this you have on there?

A. This is the same kind of thing they are wearing. This is supposedly the army thing.

The COURT. Isn't it the regular army uniform?

A. Yes, it is.

The COURT. You call it "this thing."

A. Well, you see I view the army somewhat differently from what the majority of people do.

The COURT. From what ordinary Americans do. You don't claim to be an American, do you?

A. I certainly do, sir, and I am very proud of that fact.
54 The COURT. You are proud of that fact?

A. Yes, sir.

The COURT. And yet you would see this country overrun by the Japs and the Germans and our women mutilated and all that, and you wouldn't raise your hand or your voice against that, and you say you are proud to be an American?

A. That is not the question. You misrepresent it when you state it that way. I am sorry.

The COURT. Proceed.

By Capt. BROWNE:

Q. You have no dependents, have you?

A. No, no actual dependents; no. I have been helping a French refugee, but she is on her own now.

Q. After being confined in the guardhouse, you had charges served upon, charging you with disobedience of an order to take your fingerprints, is that true?

A. I guess that is called served.

Q. Weren't they read to you? Didn't I read them to you?

A. Yes, you read them to me.

Q. And showed them to you?

A. You showed them to me.

Q. And you read right with me what I had on the charge?

A. Yes.

Captain BROWNE. That is all I have, sir.

The COURT. Any further questions?

55 Redirect examination by Mr. REILLY:

Q. Is there anything else you wish to state that you haven't already stated?

A. Well, the only thing was that I had made every effort. I was simply flabbergasted when the army authorities succeeded in holding me after this physical examination because every inquiry I have made, and I have made them from the army officers in charge of the state draft offices in Texas, I have made them from professors of law; one of them was a visiting professor of law who was there at Texas and he looked the thing up. Everybody said without any hesitation that you were not in the army until you subscribed to the oath of induction, until you took the oath of induction and taking the physical examination did not put you outside the jurisdiction of the civil courts.

Captain BROWN. Of course, the court will understand our motion to strike that as pure hearsay and argument.

A. Then I had read these similar cases, as I said in this consientious objector paper, and when I came over here to Kansas City the day before I was to go, before I came over here to Leavenworth, I phoned Mr. Lindsay. I phoned the FBI and

asked them where to turn myself in to them if I should pass this physical examination, and I phoned—before I phoned the
56 FBI, I phoned, I believe I phoned three offices. I believe it was the District Attorney and the United States Marshal and the FBI office. I talked to a Mr. Phelps. Is there a Mr. Phelps?

The COURT. He is in the Missouri office, Western District of Missouri.

A. I spoke to him. Is he an attorney?

The COURT. He is Assistant District Attorney for the Western District of Missouri.

A. Oh, yes.

The COURT. Did he tell you you could evade service in the army?

A. No; you see—no. He told me—I just called them and asked them whom I should turn myself over to.

The COURT. Oh, yes.

A. (Continuing.) After I had passed this physical and received the order to take the oath, whom I should turn myself over to and report that I was refusing to take the oath. I believe he was the one that told me to phone the FBI.

The COURT. You were seeking protection from the army?

A. That is right. Yes; I was; yes. That is right. I was not seeking to be protected by the army, but to be protected from the army.

Mr. REILLY. That is all I have.

Re-cross-examination by Captain BROWNE:

Q. I have this question, in view of his statement about
57 his treatment. Lieutenant Edwards, who was here just a moment ago, standing with me, interviewed you two times before the charges were served on you, didn't he?

A. I forget whether it was once or two times. I believe it was twice; yes.

Q. He talked with you at length?

A. Yes.

Q. And you exchanged philosophy?

A. Yes; I must say that I found you and Lieutenant Edwards quite decent people.

Q. In spite of the army. Thank you.

A. In spite of the army. You are just obeying orders and doing what you think is your duty.

Q. Then, after you had talked to Lieutenant Edwards two times and to me once, you were brought in and had considerable of a conversation with the General in his office, didn't you?

A. Yes; and I thought the General himself was a very decent man. He told me his brother had been a conscientious objector in the World War.

Q. But he said he had gotten over it since, didn't he?

A. Well, he said—I don't know whether he worded it that way.

Q. Maybe I am misquoting his exact words.

A. He said his brother was now in the army—had changed his mind.

Q. Your counsel was there at that time, wasn't he?

58 A. Yes; that is true.

Mr. REILLY. Just a minute, to keep the record straight, please. I wasn't present when he served charges on you?

A. No; I didn't mean that.

Mr. REILLY. And I wasn't present at any time when you were interviewed by anybody else but the General?

A. That is right.

Captain BROWNE. He was present at the reception center part of the time, wasn't he?

A. He came just after they had read this order. He came after—to get me to sign this petition for a writ of habeas corpus.

Mr. REILLY. You had not seen me prior to the time they read the oath to you?

A. No; I had not.

Mr. REILLY. These five officers were present in the room?

A. That is right.

Mr. REILLY. Yet they knew that you had called for an attorney?

A. That is right. You asked me over the phone if they couldn't stay this twenty-four hours or something until a writ could be drawn, and they specifically refused to do that.

Mr. REILLY. That is all.

Further re-cross-examination by Captain BROWNE:

Q. The procedure that Lieutenant Edwards was try-
59 ing to effect with you was to see if it could be worked out so you could go into a medical unit? Didn't he mention that first? Anything that would more or less solve the problem?

A. Yes; yes; I got the impression, as I think you told me: "Well, if you just go in, why, you may be Captain Billings before long." Well, they could make me anything, maybe General, and I still wouldn't go in.

Q. You don't say that I offered you a commission in the army?

A. No; I am not; but you said, "Maybe some day we may be laughing about this, and I will be calling you—" didn't you say

that, or something to that effect, "You might be a Captain in the army?"

Q. That is your recollection of your treatment?

A. By you and by him, but not by these jailors.

Q. Oh, no. You had visitors Sunday—received visitors?

A. I received a visitor Sunday.

Q. I mean you were accorded the right to receive them?

A. Yes; this particular one.

Q. At the regular visiting hour, wasn't it, sir?

A. I presume it was; yes.

The COURT. Who?

A. Joe Vorhees, of this city.

The COURT. What is his business?

A. He is a stepuncle of mine. My stepmother, who is
60 now dead, was his sister.

The COURT. Is he a conscientious objector?

A. Oh, no; and neither are any of the others in my family. Oh, no. They don't agree with me, and neither do any of the other members of my family except, I think, one of my sisters-in-law.

The COURT. Any further questions?

Captain BROWNE. I have none.

Further redirect examination by Mr. REILLY:

Q. Joe Vorhees served as a first lieutenant overseas with the AEF, didn't he?

A. He was a volunteer, too. He spent all his time trying to get me to see the light, trying to make me believe it was my duty.

The COURT. To be really a true American citizen.

A. Well, to go into the army, which he thinks is serving America, and I don't think the army is serving the best interests of this country.

Mr. REILLY. That is all I have.

Captain BROWNE. That is all I have.

The COURT. You gentlemen wish to submit any authorities?

Colloquy between Court and Counsel

Mr. REILLY. Your Honor, I have some authorities here. We do not take the Federal Supplement. There is evidently no case, as far as I have been able to find, touching on this
61 point, which has come up to the Circuit Court of Appeals nor up to the Supreme Court. There is a case in New Jersey, 38 Federal Supplement 183, that might come close to this question. It says in there where a selective service draftee was refused reclassification by the local board because of change in status and was transferred to a training camp despite his

attempted appeal from that action, and refused to take the oath of induction, his action did not constitute a waiver of civil relief, and he could seek relief by habeas corpus as against intent that he should have first declined induction and subjected himself to the charge of desertion by military authorities before he could test his intent in a habeas corpus proceeding. That was decided in 1941 in the District Court of New Jersey.

Captain BROWNE. Of course, our contention is that—and the law, two, is very clear about it—this last law, the 1940 law, your Honor, does not mention when induction begins and when it does not. It does not change the law under which the army has been exercising military jurisdiction for years. Nowhere is that changed. Men are being sentenced right now for life and I am sure to corporal punishment under this very law. It has not been changed, under the Articles of War.

Mr. REILLY. We can concede that.

Captain BROWNE. You concede that is the law now?

Mr. REILLY. We concede they are the law now.

62 Captain BROWNE. I don't say it is the law applicable to this man.

Mr. REILLY. It follows on, "all in like conditions."

Captain BROWNE. Do you concede that the Articles of War are now the law of the land? They have not been repealed?

Mr. REILLY. I concede they are the law of the land all right, applying to all those in military service and those civilians who are outside the jurisdiction of the United States, who are working for military projects, military posts or camps of that character.

Captain BROWNE. Do you concede they have not been repealed?

Mr. REILLY. It is evident they have not been repealed.

Captain BROWNE. Then here is what the law says. It is still the law if it has not been repealed. It says: "All other persons lawfully called, drafted, or ordered into"—and he says he was ordered into—"the said service from the dates they are required by the terms of the call." His date was August 12th, he said [continuing] "are subject to these articles." That is the law. This Act has not in any way changed it, but it has said this—it has said the president is authorized, Section 12 (1) "to prescribe the necessary rules and regulations to carry out the provisions of this Act." He has done so. He has prescribed training or mobilization regulations.

63 The COURT. Let me make this suggestion: that I will not decide this matter at this moment, but you gentlemen collect these authorities and these paragraphs of the law that you think apply, and give them to me at the earliest possible moment.

Captain BROWNE. I do want to furnish this citation, regulation called MR 1-7, which says, and I think, though I am not sure.

that that is taken judicial notice of, I think possibly out of an abundance of caution I should offer it in evidence.

The COURT. Very well, you may do so.

Captain BROWNE. It won't do any harm.

Mr. REILLY. I don't think the army regulations are the law.

The COURT. It may be received here and I will determine whether it shall have consideration.

Captain BROWNE. I will offer it.

Mr. REILLY. The army has gone ahead and preferred charges. I wouldn't want to be in a position, if it took a little time on this, that it is a moot question. If this petitioner were to be tried, I would like to have a little understanding here.

Captain BROWNE. No, he won't be tried while it is under consideration by this court. I think that goes without saying.

Mr. REILLY. I wouldn't want any injunction suits.

Captain BROWNE. It won't be necessary.

64 The COURT. This petitioner expects to go to prison anyway. What difference does it make which court decides it? If that is what he has been looking for, what difference does it make whether it is the army or the court.

The PETITIONER. May I interrupt, sir?

Mr. REILLY. I might say as far as I get it from what he said that in his conscientious objection to all things military, he understands he has to go to prison, but he wants to go to prison as a civilian regardless of what the punishment is. He wants to take it as a citizen and not as a military prisoner.

The COURT. All right.

Mr. REILLY. I think everything Captain Browne here has said is absolutely applicable to the law, the Selective Service law of 1917, but it was changed by the 1940 law. I will get those authorities.

Captain BROWNE. May the record show we move for judgment on the pleadings?

The COURT. Yes, it may so show. I really think you are entitled to it, but I will go into the question thoroughly.

Captain BROWNE. The first brief will come from the petitioner?

Mr. REILLY. That is right.

Captain BROWNE. We won't need but two or three days to answer it.

65 The COURT. Yes, furnish copies to the other side.

Mr. REILLY. I am in this position, your Honor, to get access to the Federal Supplement, I will have to make a trip to Topeka.

Captain BROWNE. We have it.

The COURT. Have it within three days.

The PETITIONER. Pardon me. May I make one more statement just for the sake of the record, and that is that from the very first the army officials with whom I have come in contact have wished to keep the facts of this thing away from the public.

The COURT. Away from the public?

The PETITIONER. Away from the public, which I believe is not *right in a country* that once was a democracy.

The COURT. I observe a couple of newspaper men around here this afternoon. Maybe they will help you out.

The PETITIONER. I am glad they are here. I wasn't aware of that fact, but even General Truesdale said, "I don't want this to get into the press." I think they don't want it to get into the press because they are ashamed of the high-handed manner in which they have conducted themselves. For my part, I am not ashamed. I am proud of going to prison for standing up for what I believe in.

The COURT. You will be proud to turn this country
66 over to the Germans.

The PETITIONER. I would not, sir.

The COURT. Let them annihilate and rape our women and do all other kinds of things?

The PETITIONER. Sir, that is an unjust accusation.

The COURT. Well, your attitude gives that impression, sorry as it may be.

The PETITIONER. I am very sorry that it does so, because it is an erroneous impression.

The COURT. I am sorry, too, that an able-bodied young man like you, would be so obtuse in your mind or such a physical coward that you would not do anything in this great emergency to help your country.

The PETITIONER. Sir, I am willing to do anything to help my country, but I don't think it helps my country to promote this war.

The COURT. The country is the one to decide that question and the country has decided it. You don't think the majority should control. No, that will be all, gentlemen. I will consider your authorities, and pass on them.

Captain BROWNE. Since the prisoner is apparently speaking for the record, I would like to leave in the record the statement that a representative of the Kansas City Star is here and the Leaven-
worth Times, and that our publicity officer is here, and that
67 of course any publicity that the papers want to give it, they are fully entitled to. and I would like to ask the petitioner this one question, if I may?

The COURT. You may.

Captain BROWNE. Isn't it true that General Truesdale told you that for your benefit, he would rather that there weren't any publicity?

The PETITIONER. The General said for my benefit, but I am not convinced it was for my benefit.

The COURT. Then you misstated him a while ago.

The PETITIONER. No, sir; I did not. He said, "I don't want this to get into the press," and he said, "You might object to the publicity."

The COURT. For your benefit.

The PETITIONER. No, I said, I wanted in the prison. He said, "This is partly for your protection. You might need protection against mob violence."

The COURT. All right, gentlemen. Submit your briefs.

68 [Reporter's certificate to foregoing transcript omitted in printing.]

69 In United States District Court

[Title omitted.]

Memorandum Opinion

Filed Sept. 11, 1942

HOPKINS, District Judge:

This is a habeas corpus case. Petitioner contends that he is unlawfully restrained of his liberty and held for army service by Maj. Gen. Karl Truesdell United States Army, Leavenworth, Kansas; that petitioner is not a member of the armed forces of the United States, is not subject to military jurisdiction, and that he should be brought before the civil courts for any alleged unlawful act committed by him. In response the Army sets up that petitioner was duly inducted into the Army on or about August 13, 1942, for the duration of the war, and that formal charges had been preferred against petitioner for wilful disobedience of a lawful command of his superior under Article of War No. 64. In reply to this, petitioner states that he is a conscientious objector and urged that claim before his local draft board, and being overruled appealed to the state board, and being denied by the state board, he then presented himself at the reception center, Fort Leavenworth, Kansas, where he was given a physical examination and notified of his acceptance for service in the Army, and thereafter was commanded to stand and take an oath of induction, which he refused, informing the officers that he was a conscientious objector.

The writ was ordered to issue. Petitioner was produced in court and testified at some length.

From petitioner's own testimony it appears that he reported to the reception center at Leavenworth in obedience to orders of

his local draft board; that upon reporting he was assigned to barracks, slept there that night, and on the following morning a soldier directed him to the army mess hall where he had his breakfast and proceeded with various tests and examinations, including physical examination. The next step involved finger printing and petitioner balked, saying that if finger printing "involves induction into the army I shall refuse to be finger printed," and speaking to officers in the induction office petitioner explained his intention to refuse to serve in the army and asked to be turned over to the civil authorities. The officers explained that petitioner was already in the army and ordered him to stand and take the oath. Petitioner refused to stand and refused to raise his hand, and after the oath was read to him he said, "I do not. I refuse to take this oath." Petitioner was then ordered to the guard house and this habeas corpus proceeding followed.

We have the question: When is induction actually accomplished? In the movement from civilian to soldier, at what point does the authority of the military attach? Can a draftee, examined and found acceptable and who has been notified of his acceptance and told that he is now in the army, stay beyond the reach of military orders by refusing to take and accept an oath? Has this government become so impotent that in a time of great emergency and danger army service must depend upon acceptance by the citizen? If so, petitioner should be ordered released, but if not, the writ should be denied. The question is one of jurisdiction; jurisdiction of the Army over the petitioner (Sanford v. Robbins, 115 Fed. 2d 435, cert. denied 312 U. S. 697).

Before giving specific consideration to the Selective Service Act and the rules and regulations made thereunder, it may be of interest to review some of the facts developed by petitioner's testimony.

Petitioner is a single man with no dependents. He is thirty-one years of age, six feet tall and weighs 165 pounds. To all appearances he is a well-developed, able-bodied man. His preliminary education was in this state. He was graduated from the University of Kansas, high in his class; was elected to Phi Beta Kappa. He later attended the University of Paris for two years. Following this he served three years in the diplomatic service in the American Embassy at Moscow. Spent some time in China and Japan. Later studied at Harvard University where he procured his Master's Degree. Is working for a Doctor's Degree. During the past summer he has taught in the University of Texas.

It appears that instead of being a conscientious objector under the regulations and the law, petitioner is an agnostic, as found

by the draft board. He likens himself to Socrates and refuses to conform to or abide by any law of the United States that does not suit his whim. While claiming to be a citizen of the United States ("and proud of it"), he says he believes, with some modifications, in the doctrine of Mohandas Gandhi. He says that if the Germans and the Japanese came to take over our country, our people and institutions, he would refuse to resist but would refuse to cooperate with them. He discounts
71 claims of German and Japanese atrocities; says they are greatly exaggerated and asserts that many of the alleged German atrocities of the last war did not in fact take place.

It is helpful to review some of his testimony in considering the question presented:

"I have friends who are professors of law there at the University of Texas also, and they were rather interested in my case and they looked up the law and they told me * * *"

Q. (Interrupting.) "When did they do that?"

A. "Oh, this was last January."

Q. "You were sort of getting ready for this business?"

A. "Oh, yes; I have expected to go to prison if I passed the physical examination. I expected to go to prison anyway. I had made up my mind I would never serve in the army and I would take the consequences, whatever they might me, so I had inquired from everybody who I thought might know about the draft law. I went to the state draft headquarters at Austin, Texas. The draft headquarters are in the same city as the University and the state officials of the draft there, who are army men, informed me that I was not in the army until or unless I took the oath of induction and took the physical examination."

Q. "You know some of these officers might be mistaken as to what the law is."

A. "Yes; they might be, but I take also a conscientious objector newspaper. * * *"

A. "And in this magazine they reported a number of cases. They record cases. That is mainly what the magazine is for, to inform other conscientious objectors."

Q. "Well, you have been studying and working on this question then for a good many months, I take it?"

A. "Oh, yes; after all, it involved my whole life; my future and everything."

Q. "Did you tell some folks that you were going to take this physical examination and you thought likely you wouldn't pass, but if you did, then you were going to refuse to serve?"

A. "Oh, yes; I told many people that * * *"

Q. "Yes. Why do you seek to get into the civil courts? If you don't believe in everybody obeying the laws and the rules, why do you wish to submit your matter to any courts?"

72 A. "Well, I don't know. It is sort of like Socrates drinking the hemlock. I thought the law was unjust, but I didn't feel the call to evade it."

* * * * *

Q. "Have you ever voted at elections?"

A. "Yes; oh, surely."

Q. "Did you vote for a congressman?"

A. "Yes."

Q. "Did you expect him to vote to adopt laws that you wouldn't abide by?"

A. "Well, no."

* * * * *

Q. "Anyhow, why do you prefer the civil courts since there are two options? Why do you prefer the civil courts rather than the court martial of this army?"

A. "Well, I don't know * * * I think the civil courts are more objective and more fair; that they will convict me of what I am actually guilty of, for refusing to serve * * * I was simply flabbergasted when the army authorities succeeded in holding me after this physical examination because every inquiry I have made, and I have made them from the army officers in charge of the state draft offices in Texas, I have made them from professors of law; and one of them was a visiting professor of law who was there at Texas and he looked the thing up. Everybody said without any hesitation that you were not in the army until you subscribed to the oath of induction, until you took the oath of induction, and taking the physical examination did not put you outside the jurisdiction of the civil courts."

* * * * *

The Court. "You were seeking protection from the army?"

A. "That is right. Yes, I was; yes. That is right. I was not seeking to be protected by the army, but to be protected from the army."

Referring to the attempt of a friend to change him:

A. "He was a volunteer, too. He spent all his time trying to get me to see the light; trying to make me believe it was my duty."

The Court. "To be really a true American Citizen?"

A. "Well, to go into the army, which he thinks is serving America, but I don't think the army is serving the best interests of this country * * *"

Speaking of his refusal to put on a uniform, petitioner testified:

The Court. "What is this you have on?

78 A. "This is the same kind of thing they are wearing. This is supposedly the army thing."

The COURT. "Isn't it the regular army uniform?"

A. "Yes, it is."

The COURT. "You call it, 'this thing.'"

A. "Well, you see I view the army somewhat differently from what the majority of people do."

The COURT. "From what ordinary Americans do. You don't claim to be an American, do you?"

A. "I certainly do, sir; and I am very proud of that fact."

Petitioner was quick to seek the court and the aid afforded by its processes. He draws upon rights accorded to him and all other alike, and without prejudice by reason of the somewhat ambiguous philosophy disclosed in his testimony.

The history of the writ of habeas corpus is lost in antiquity. But it was in use before Magna Charta and exists today as part of the fundamental law of the land. It is a writ which cannot be abrogated or its efficiency curtailed by legislative action. Its position is made secure by the provisions of Article I, Section 9 of the Constitution.

Judge Murrah of the Tenth Circuit Court of Appeals has said:

"The writ of habeas corpus is a shield that guards and protects the constitutional liberties of the American citizen. Through it we inquire to see whether fundamental rights have been violated. Its function or use should not be construed or employed so narrowly as to defeat the salutary purpose it serves in our system of government" (Lunsford v. Hudspeth, 126 Fed. 2d. 653).

Habeas corpus in character is that of a civil proceeding. It seeks the enforcement of civil rights. Resort to the writ is had not to inquire into the criminal act of which complaint is made, but into the right of liberty, notwithstanding the act, and the immediate purpose to be served is relief from illegal restraint.

The ultimate inquiry is the jurisdiction of the holding authority (here the Army) (Collins v. Johnston, 237 U. S. 502; Frank v. Mangum, 237 U. S. 309).

The pertinent inquiry in a habeas corpus proceeding is to determine the jurisdiction of the court (in this instance the Army), pronouncing the sentence, or procedure, and giving the judgment. If the court (or the Army), has jurisdiction, any irregularities in procedure or decision are matters for appeal and cannot be reviewed in habeas corpus.

74 The Selective Service Act of 1940, Section 11 (50 U. S. C. A. 311), carries a provision that:

"No person shall be tried by any military or naval court martial in any case arising under this act unless such person has been actually inducted for the training and service prescribed under

this act or unless he is subject to trial by court martial under laws in force prior to the enactment of this act."

This provision in the new Act is in absolute harmony with the earlier decisions of the courts interpreting that part of the Second Article of War (10 U. S. C. A. 1473) that persons subject to military law shall include all persons "lawfully called, drafted, ordered into, or to duty, or for training in the said service, from the dates they are required by the terms of the call, draft or order to obey the same." The decisions under this provision held that until actually inducted the right of the party are determined by the civil law (Ex Parte Henderson, 11 Fed. Cas. No. 6359; Ex Parte Goldstein, 268 Fed. 431; U. S. v. McIntyre, 4 Fed. 2d. 823; Ver Mehren v. Sirmyer, 36 Fed. 2d. 876).

Induction—When and how accomplished, is the question presented. Petitioner contends that for one to be finally inducted he must not only be acceptable and so notified, but he must agree to accept service; that he must take the oath; that law or regulation to the contrary is unconstitutional; that failure to take the oath of allegiance continues in effect the police power of the civil authorities and the force that restrains the cloak of military authority descending upon the selectee.

The Selective Training and Service Act of 1940 (50 U. S. C. A. 301, et seq.), and the Service Extension Act of 1941 (50 U. S. C. A. 351, et seq.), provides for registration of persons liable for training and service, exemption, deferments, terms, etc. But these Acts do not set out the procedure for induction. There was delegated to the President the authority "to prescribe the necessary rules and regulations to carry out" the provisions of the Act.

Rules and regulations now in effect and in effect at the time petitioner presented himself at the Leavenworth reception center carry no provision for the giving of an oath as an incident to induction. The pertinent regulations read:

633.1 "Immediately upon determining which men are to report for induction, the local board shall prepare for each man an Order to Report for Induction (Form 150), in duplicate. The local board shall mail the original to the registrant and shall file the copy in his Cover Sheet (Form 53)."

633.2 "After selecting the registrants who are to fill the call, the local board shall designate one selected man to be the leader of the group and one or more to be assistant leaders."

633.2 "(c) Leaders and assistant leaders shall have such authority as is necessary to deliver the group to the induction station."

633.3 "Before the time set for selected men to report for delivery to the induction station, the local board shall prepare a Delivery List (Form 151), in triplicate."

633.4 "Before the time set for selected men to report for delivery to the induction station, the local board, unless otherwise directed, shall prepare Government Requests for Transportation (Standard Form No. 1030) and Government Request for Meals or Lodgings for Civilian Registrants (Form 256)."

633.6 "PROCEDURE BEFORE DELIVERY.—(a) At the time and place designated for the selected men to report for delivery, the local board shall:

(1) Call the roll of selected men.

(2) Read and issue the appointment of the leader and assistant leaders.

(3) Turn over to the leader the transportation request or tickets, the meal and lodging requests, and the records for the induction station.

(4) Notify the leader of arrangements that have been made at the induction station for the reception of the selected men.

(5) Specifically order the selected men to obey the leader and assistant leaders.

(6) Specifically order the selected men to report to the induction station."

633.8 "In the manner and to the extent prescribed by regulations of the land or naval forces, the commanding officer of the induction station is required to have the selected men met at the railroad station or bus terminal, transported to the induction station, and provided with food and lodging after their arrival and pending their induction or rejection."

633.9. "At the induction station, the selected men found acceptable will be inducted into the land or naval forces."

Pertinent also is Regulation 601.8, which defines induction station as any camp, post, etc., where selected men are received by the military authorities and if found acceptable are inducted into military service.

This court takes judicial notice that there exists an induction station on the Fort Leavenworth Military Reservation where this petitioner was received and found acceptable.

As to the regulations on induction (now Section 633.9 but formerly Par. 429) it is important to note that the earlier regulation, Par. 429, contained the provision that:

76 "After examination at the induction station, the selected men found acceptable will be inducted into the land and naval forces. An officer of the Army, Navy, or Marine Corps will administer a prescribed oath to each of the men. He will then inform them that they are members of the land and naval forces, and will explain their obligations and privileges."

There can be no question but that petitioner is subject to the military law. The question is not close enough even to be debatable. The amendment of the regulation to eliminate the provision for the administration of an oath undoubtedly was done to avoid question being raised and to avoid waste of army time and effort in resisting such improvident proceedings as the one here.

I would be of like opinion if Paragraph 429 of the earlier regulation were still in effect. After a draftee has reported to a reception center and has been subjected to his physical and other examinations, has passed said examination and has been notified of his acceptance, the giving of an oath and admonition that you now are in the Army, constitute mere formality. A desirable step, perhaps; but merely formal, none the less. The whole statutory procedure outlined in the Act and the Regulations thereunder culminating in petitioner's examination and notice of acceptance operated as Induction.

Induction is completed upon acceptance by the government and irrespective of the desires, acts, and mental attitudes of the party affected. Upon acceptance by the government, induction occurs by operation of law. It is something over which the party affected, petitioner in this case, has no control. It is not the acceptance by him of the oath, but the acceptance by the government of him as a soldier.

There is a point of difference in this respect as between a party brought into the service by operation of the draft act, and one who volunteers his services. As to the latter, Article of War 109, requires that at the time of his enlistment every soldier shall take a prescribed oath. And see Franke v. Murray, 248 Fed. 865.

It should be borne in mind in this case that petitioner's actions as disclosed by his testimony are the result of long deliberation, consultation and study, and careful calculation, and that he has in fact fully complied with the requirements of the Selective Training and Service Act. There may be some question as to whether he has committed an act for which he can be prosecuted in the civil courts, and an order from this court releasing
77 him from the military authority might have the anomalous result that petitioner would walk away scot free of both the military and civil authorities.

In considering matters of this kind we must not overlook the fact that our country is at war; that its very life is at stake, and that soldiers are necessary. If half the young men of our country were disposed, as this individual, we would indeed be easy prey for the powers that have set out to enslave humanity and destroy freedom everywhere. He appears to be a perfect example of

what any ordinary, red-blooded American would dub "an over-educated, egotistical, scholastic slacker."

The Selective Service Act, under which the petitioner is held by the Army, is based on the principle that every citizen owes it as a duty to defend this nation. As said in United States v. Dewey, 37 Fed. Supp. 449:

"Under its terms, the burdens of military service will be borne equally by all classes regardless of economic means. We should remember that in order to have the privileges and benefits of citizenship in this country, we each must assume some burdens and discomforts. We should examine our own moral fibre and character and above all, do our duty. The times make it imperative that every one of us should realize that he owes everything he has, his life, his property, and everything else to the cause of preserving the liberties we cherish. So far as is necessary, our government has the right to call upon us to make that sacrifice * * *.

"Every intelligent person knows that the power to make such a decision is one of the most essential, vital and momentous of all the powers of government. We cannot maintain our independence or protect our citizens against oppression or continue to be free, without such power being delegated to some authority, and one of the chief duties of citizenship is a time of great emergency like this to recognize such authority."

78 The spirit of the petitioner is one of rebellion against the laws of the United States, against his government. The effect of his action and those like him is to hinder the war effort the government deems necessary in this distressing emergency. If half the young men should decide to violate some law or refuse to abide by some rule of law of which they disapprove, we would have anarchy. The purpose and effect of such an attitude would be so plain that it would be impossible not to conclude that such citizens are at heart traitors to their country.

"When the Axis powers did actually apply their principles of action to other peaceful nations by invasion, they violated every solemn covenant they had made to observe the law and neutrality established for the protection of peaceful states. They ruthlessly sent their armed forces to do pillage and destruction to their peaceful neighbors. They committed wholesale murder of defenseless old men, women and children, without warning and in contempt of every law and the dictates of humanity". (U. S. v. Dewey, supra).

In the face of all these atrocities, this petitioner is one of the very few willing to violate the laws of his country and indirectly at least give aid and comfort to these world assassins.

In this country we have a natural abhorrence of compulsion. We like to believe that when danger threatens the country every individual citizen will come forward immediately and voluntarily do his duty. Not so with this petitioner.

It is a matter of common knowledge that during past generations this country has shown great sympathy to Japan and the Japanese people. On occasions we have been more than generous when disaster has come to them.

After the attack upon Pearl Harbor, which resulted in the murder of more than three thousand of our finest young men, Secretary of State Hull stated in substance, that this attack upon the United States was treacherous and utterly unprovoked; that the Japanese professions of desire for peace (at the very moment of the attack), were "infamous, false, and fraudulent."

Notwithstanding all this, the petitioner says that Japan was justified (partly) in such treacherous attack.

79 It is difficult to understand how such apparent disloyalty could abide in the soul of any human being; a disloyalty as foul as treason itself.

He now comes petitioning the court for relief from the responsibility of performing the smallest duty to the country that has, according to his own testimony, showered upon him its blessings, and bounty.

Might it not be said that were he given his just deserts, he would be consigned to the German and Japanese murderers, where common, decent, human actions and sympathy abide not?

The government through its regularly constituted channels has classified each man of soldier age according to his ability. In this period of storm and stress each one of us should classify himself in a questionnaire something like the following:

Am I an American citizen?

Do I realize or comprehend what it means to be a citizen of this country?

Do I realize the bountiful blessings that I here enjoy? The blessings of liberty and freedom?

Have I done my full share in the great struggle to preserve in my country the blessings of liberty and to resist everywhere the atrocious will of the barbarian dictators who would enslave the world?

Have I cooperated in every way in carrying on the war effort?

Have I done everything within my power, and willingly, to promote production of the weapons of war, or is it possible that I have been a profiteering parasite? a slacker? a drone? or ever a striker?

Have I actually given the enemies of my country cause to rejoice by impeding our war effort by aiding or abetting the stoppage of work, or going on strike?

Every person and every organization in our nation should be cooperating in the war effort. If doubt existed whether the Army's interpretation was correct of any provision of the selective service act, or of the regulations thereunder, that doubt should be resolved in favor of the Army's view. But I think there is no doubt. The United States Army has jurisdiction of this petitioner.

I am of the opinion the writ should be denied; the petition dismissed, and an appropriate order may accordingly be submitted.

[File endorsement omitted.]

80 In United States District Court

[Title omitted.]

Order discharging writ of habeas corpus

Filed Sept. 11, 1942

Now on this 18th day of August 1942, this matter comes on for hearing before the United States District Court at Leavenworth, Kansas, on the Writ of Habeas Corpus issued herein and the Response of the Respondent, Major General Karl Truesdell, United States Army, Leavenworth, Kansas. The petitioner being represented by his counsel, W. D. Reilly, and being present in person; and the respondent being represented by Allan R. Browne, Captain, Judge Advocate General's Department, United States Army, and by Lester Luther, Assistant United States Attorney for the District of Kansas.

The petitioner, after being duly sworn, testified in his own behalf, and rested; and the respondent offered his testimony and rested.

And thereupon, after having heard the argument of counsel, the Court announced that the above-entitled cause would be taken under advisement and requested the submission of written briefs by counsel for the petitioner and the respondent.

And now on this 11th day of September 1942, this cause comes on for the decision of the Court.

The Court, having heard the evidence, the argument of counsel, and having fully considered the written briefs filed herein by counsel for the petitioner and by respondent, finds:

Findings of fact

1. That the petitioner, Arthur Goodwyn Billings, is a male citizen of the United States, of the age of thirty-one years; that he registered under the Selective Training and Service Act of 1940 on the 16th day of October 1940, with Local Board No. 1 for Ottawa County, Minneapolis, Kansas; that he was finally classified by the said Local Board and was put in Class 1-A; that Order to Report for Induction (DSS Form 150) was mailed to the petitioner, directing him to report at Minneapolis,
81 Kansas, on August 12, 1942, at 10:45 a. m.; that in response to a telephone conversation with the Clerk of the Local Board, he joined the Minneapolis selectees at Victory Junction, Kansas, and continued on with them to Fort Leavenworth, in compliance with the Order to Report for Induction; that he was met at the bus stop by a soldier who directed him to go and find a bunk; that he was furnished his breakfast at an Army Mess Hall, and reported at the Induction Center for a physical examination, and after the examination was completed, he was informed that he had been accepted and that he was then in the Army; thereupon, the petitioner was informed it would be necessary that he be finger-printed, and he replied that if finger-printing "involves induction into the Army, I shall refuse to be finger-printed"; that the petitioner advised the officers he was refusing to serve in the Army and asked to be turned over to the civil authorities. The officers explained that the petitioner was already in the Army, and ordered him to stand and take the oath. Petitioner refused to stand, refused to raise his hand, and after the oath was read to him, he said, "I do not. I refuse to take this oath." Petitioner was later ordered to the guardhouse.

2. That all the proceedings of the Selective Service Board leading up to the delivery of the petitioner to the induction center at Fort Leavenworth were had and performed in due form of law and in accordance with the Selective Training and Service Act of 1940, as amended, and the Rules and Regulations promulgated thereunder.

3. That the petitioner was duly and lawfully inducted into the United States Army, and on August 13, 1942, was legally and lawfully in the custody and control of the respondent.

Conclusions of law

1. That the petition, together with the writ of habeas corpus, and the return thereto, and the evidence adduced, clearly show that the writ should be discharged.

2. That the petitioner was regularly and lawfully inducted into the United States Army on or about August 13, 1942, and that formal charges had been preferred against petitioner for wilful disobedience of a lawful command of his superior officer under Article of War No. 64. That the petitioner is in the legal, lawful custody and control of the respondent.

It is, therefore, now ordered, adjudged, and decreed that the Writ of Habeas Corpus issued herein be and the same
82 hereby is discharged, and the petitioner is remanded to the custody of the respondent.

The petitioner is allowed his exceptions.

It is so ordered.

RICHARD J. HOPKINS,
Richard J. Hopkins, *Judge.*

Approved:

ALLAN R. BROWNE,
Allan R. Browne,
Captain, JAGD,
Leavenworth, Kansas.

LESTER LUTHER,
Lester Luther,
Assistant U. S. Attorney,
District of Kansas,
Federal Building, Topeka, Kansas,
Attorneys for Respondent.

W. D. REILLY,
Leavenworth, Kansas,
Attorney for Petitioner.

[File endorsement omitted]

83 In United States District Court

[Title omitted]

Notice of appeal

Filed Sept. 16, 1942

Notice is hereby given that Arthur Goodwyn Billings, applicant above named, hereby appeals to the Circuit Court of Appeals for the Tenth Circuit from the final judgment entered in this action on September 10, 1942.

WM. D. REILLY,
Attorney for Arthur Goodwyn Billings,
Times Building, Leavenworth, Kansas.

[File endorsement omitted]

In United States District Court

Note re filing of cost bond

Cost bond on appeal, in the sum of Two Hundred Fifty Dollars ($250.00), signed by Arthur G. Billings, as principal, and Margaret E. Felton, as surety, was filed in the District Court October 24, 1942.

84 In United States District Court

Order enlarging time to file and docket appeal

Filed Oct. 26, 1942

Now, on this 26th day of October 1942, for good cause shown, it is ordered that time for filing and docketing appeal in above entitled case be and is hereby enlarged to and including November 16, 1942.

RICHARD J. HOPKINS, *Judge.*

[File endorsement omitted]

85 In United States District Court

Order enlarging time to file and docket appeal

Filed Nov. 14, 1942

Now, on this 14th day of November 1942 for good cause shown, it is ordered that time for filing and docketing appeal in above entitled case be and is hereby enlarged to and including December 15, 1942.

RICHARD J. HOPKINS, *Judge.*

[File endorsement omitted.]

86 [Clerk's certificate to foregoing transcript omitted in printing.]

87 In United States Circuit Court of Appeals, Tenth Circuit

Order of submission

Second Day, March Term, Tuesday, March 16th, A. D. 1943.

Before Honorable Orie L. Phillips, Honorable Alfred P. Murrah, and Honorable Robert L. Williams, Circuit Judges.

This cause came on to be heard and was argued by counsel. Lee Bond, Esquire, appearing for appellant, Lester Luther, Esquire, and Allan R. Browne, Esquire, appearing for appellee.

Thereupon this cause was submitted to the court.

88 In United States Circuit Court of Appeals

ARTHUR GOODWYN BILLINGS, APPELLANT

v.

KARL TRUESDELL, MAJOR GENERAL, UNITED STATES ARMY, APPELLEE

Appeal from the District Court of the United States for the District of Kansas

Lee Bond for appellant.

Lester R. Luther, Asst. U. S. Atty., and Allan R. Browne, Major, JAGD, Staff Judge Advocate (George H. West, U. S. Atty., Eugene W. Davis, Asst. U. S. Atty., and Bert E. Church, Captain, JAGD, Litigation Officer, Seventh Service Command, were with them on the brief), for appellee.

Before PHILLIPS, MURRAH, and WILLIAMS, Circuit Judges.

Opinion

April 30, 1943

PHILLIPS, Circuit Judge, delivered the opinion of the court.

Arthur Goodwyn Billings, hereinafter called the petitioner, filed his application for a writ of habeas corpus directed to
89 Major General Karl Truesdell, Commanding Officer, Reception Center, United States Army, Fort Leavenworth, Kansas, in whose custody petitioner was detained. The writ was issued and Major General Truesdell duly filed his return thereto. After a hearing, the trial court entered an order discharging the writ and remanding petitioner to the custody of Major General Truesdell. The petitioner has appealed.

The petitioner is thirty-one years of age. He graduated with honors at the University of Kansas in 1933. Thereafter, he attended the University of Paris for two years and served three years in the American Diplomatic Service at Moscow. In 1938 he spent a short vacation in China and Japan and in the fall of that year entered Harvard University. After three years of studies at Harvard, he received his Master's Degree and passed the general examination for a Doctor's Degree but did not write the thesis required for the latter degree. He became a professor in the University of Texas in the fall of 1941 where he remained until called for induction into the Army.

Petitioner registered under the Selective Training and Service Act of 1940,[1] 54 Stat. 885, in the first registration with local

[1] Hereinafter referred to as the Act.

board No. 1, for Ottawa County, Minneapolis, Kansas. He was classified in Class 1-B because of a defective eye. Later, he was reclassified and placed in Class 1-A. He sought reclassification on the ground that he was a conscientious objector. The local board denied his claim for reclassification. From that ruling he appealed. The decision of the local board was sustained by the Board of Appeals. Petitioner determined that he would not serve in the armed forces of the United States. He believed, however, that upon his physical examination, he would be rejected because of defective vision in one eye. He determined to comply with Selective Service requirements up to the point where the civil jurisdiction ceased and military jurisdiction commenced, or just short of submitting himself to the latter jurisdiction. He made inquiries of Selective Service
90 officials in Texas and of others to ascertain up to what point he could comply with the requirements of the Act and the regulations and orders made pursuant thereto, including the order of his local board to report for induction, and stop short of actual induction into the Army. He was ordered by the local board to report to Minneapolis, Kansas, for induction into the armed forces. With the consent of the local board, he joined, at Victory Junction, Kansas, the group selected for induction, and was transported to the induction station at Fort Leavenworth, Kansas. He went to the barracks, was furnished his meals and lodging, and submitted to a physical and mental examination. He was advised that he had passed and would be accepted. He was then taken to a room at the induction station and in the presence of several officers was asked to stand and take oath, which he refused to do. The oath of induction was then read to him and he was asked if he subscribed to that oath. He stated he did not. He was then informed that he was in the Army. He was then ordered to submit to having his fingerprints taken. He refused so to do. He endeavored to surrender to the civil authorities. Military charges were then preferred against him for refusing to be fingerprinted and he was confined in the guardhouse.

He predicated his petition for the writ of habeas corpus on the alleged ground that he had not been inducted into the Army and that, therefore, the military authorities had no jurisdiction over him.

Section 3 of the Act, as amended, 50 U. S. C. A. § 303, in part, provides:

"(a) Except as otherwise provided in this Act, every male citizen of the United States, and every other male person residing in the United States, who is between the ages of twenty and

forty-five at the time fixed for his registration, * * * shall be liable for training and service in the land or naval forces of the United States: * * *"

91 Section 10 of the Act, 50 U. S. C. A. § 310, in part provides:

"(a) The President is authorized—

"(1) to prescribe the necessary rules and regulations to carry out the provisions of this Act; * * *"

Section 11 of the Act, 50 U. S. C. A. § 311, makes it a criminal offense for any person knowingly to fail or neglect to perform any duty required of him under or in the execution of the Act or the rules or regulations made pursuant thereto, and provides that "No person shall be tried by any military or naval court martial in any case arising under this Act unless such person has been actually inducted for the training and service prescribed under this Act or unless he is subject to trial by court martial under laws in force prior to the enactment of this Act."

The applicable regulations promulgated under the Act provide: That immediately upon determining which men are to report for induction, the local board shall prepare for each man an order to report for induction, in duplicate, and mail the original to the registrant; that from the men selected to fill the quota the local board shall designate one to be the leader of the group and one or more to be assistant leaders; that the leaders and assistant leaders shall have such authority as is necessary to deliver the group to the induction station; that the local board shall prepare government requests for transportation and for meals or lodgings for civilian registrants; that at the time and place designated for the selected men to report for delivery, the local board shall call the roll of selected men, read and issue the appointment of the leader and assistant leaders, turn over to the leader the transportation, meal and lodging requests, and the records for the induction station; and order the selected men to obey the leader and assistant leaders and report to the induction station; that the commanding officer of the induction station shall have the selected men transported

92 from the railroad station or bus terminal to the induction station and have them provided with food and lodging after their arrival and pending their induction or rejection; and that at the induction station, the selected men found acceptable will be inducted into the land or naval forces. Tit. 32, Fed. Reg., December 31, 1941, §§ 633.1 (a), 633.2 (a) (c), 633.4 (a), 636.6 (a), 633.8, 633.9.

MR. 1–7, Par. 13e (War Department Circular No. 136, 5–7–1942), in part, provides:

"(1) All men successfully passing the physical examination will be immediately inducted into the Army. The induction will be performed by an officer in a short, dignified ceremony in which the men are administered the oath, Article of War 109:

"'I, _____, do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to the rules and Articles of War.' * * *

"(4) They will be informed that they are now members of the Army of the United States and given an explanation of their obligation and privileges. In the event of refusal to take oath (or affirmation) of allegiance by a declarant alien or citizen he will not be required to receive it, but will be informed that this action does not alter in any respect his obligation to the United States * * *"

The underlying theory of the Act is that the obligations and privileges of military training and service should be shared generally in accordance with a fair and just system of selective
93 compulsory military training and service.[2] Section 3 (a) of the Act, with certain exceptions not here material, makes every male citizen of the United States between the ages of twenty and forty-five at the time fixed for his registration, liable for training and service in the land or naval forces of the United States. When a selected man has reported for induction and been transported to the induction station and found acceptable, induction is not a matter of choice with him. Being subject to compulsory training and service, having reported for induction, and having passed the requisite examinations, it is the duty of the military authorities immediately to induct him and he cannot avoid induction by refusing to take the oath. The regulations, in effect, provide that refusal to take the oath shall not alter in any respect the selected man's obligation to the United States. Induction was completed when the oath was read to petitioner and he was told that he was inducted into the Army.

We conclude, therefore, that the military authorities had jurisdiction over petitioner and that the writ was properly discharged.

Affirmed.

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[1] 1, 54 Stat. 885, 50 U. S. C. A. § 301.

94 In United States Circuit Court of Appeals

Judgment

May 5, 1943

Twenty-fifth Day, March Term, Wednesday, May 5th, A. D. 1943. Before Honorable Orie L. Phillips, Circuit Judge, and Honorable J. Foster Symes, District Judge.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Kansas.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed; and that Karl Truesdell, Major General, United States Army, appellee, have and recover of and from Arthur Goodwyn Billings, appellant, his costs herein.

In United States Circuit Court of Appeals

Note re issuance of mandate

On June 10, 1943, the mandate of the United States Circuit Court of Appeals, in accordance with the opinion and judgment of said court, was issued to the United States District Court.

95 [Clerk's certificate to foregoing transcript omitted in printing.]

96 Supreme Court of the United States

[Title omitted]

Order allowing certiorari

Filed October 11, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] Enter Lee Bond. File No. 47708. U. S. Circuit Court of Appeals, Tenth Circuit. Term No. 215. Arthur Goodwyn Billings, Petitioner vs. Karl Truesdell, Major General, United States Army. Petition for a writ of certiorari and exhibit thereto. Filed July 30, 1943. Term No. 215 O. T. 1943.

U. S. GOVERNMENT PRINTING OFFICE: 1943

FILE COPY

SUPREME COURT

OF THE

UNITED STATES

No. 215

ARTHUR GOODWYN BILLINGS . . . . . Petitioner

vs.

KARL TRUESDELL, Major General . . . . Respondent
United States Army

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

LEE BOND
Of Counsel

ARTHUR GOODWYN BILLINGS
Petitioner

INDEX

No. .....

SUPREME COURT

OF THE

UNITED STATES

ARTHUR GOODWYN BILLINGS . . . . . Petitioner

vs.

KARL TRUESDELL, Major General . . . . Respondent
United States Army

PETITION.

Arthur Goodwyn Billings, in propra persona, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Tenth Circuit, entered in the above cause on April 30, 1943, affirming the judgment of the United States District Court for the District of Kansas.

STATEMENT OF THE MATTER INVOLVED.

The petitioner registered under the Selective Training and Service Act of 1940 with the Ottawa County, Kansas, draft board, but stated on his registration card that he would never serve in the army. With his questionnaire he filed the form provided for conscientious objectors, stating therein his rea-

sons for opposing war and conscription. He was first put in class 1-B on account of defective eyesight, then in 1-H on account of his age, and finally (with the general reclassification which followed this country's official entrance into the war) in class 1-A. The law permitted the contesting of this last classification, and petitioner contested it. He was accorded a hearing at which he was allowed to set forth his reasons for opposing war and conscription. Petitioner stated, among other things, that, while he was an agnostic with regard to theology, he believed in the fundamental rightness and soundness of the teachings attributed to Jesus with regard to human conduct. He was told that his objection to war was "rational rather than religious" and was reminded that the draft law provided special treatment only for those who object to war "by reason of religious training and belief." The board decided not to change its classification. The board of appeals sustained the classification of the local board.

Petitioner, while determined never to serve in the army, had no desire to go to prison for violating the draft law if under the terms of that law he might not be found physically fit for the service in the army anyway. So petitioner, who was then teaching at the University of Texas in Austin, made inquiries of the army officers in charge of the state draft headquarters in that city as to whether he could take the final physical examination without becoming subject to military jurisdiction if he should pass the physical examination and refuse to report for induction. He was told by these draft officials that no one was subject to trial by court martial unless he had been "actually inducted" into the army, that one was not inducted until he subscribed to the oath of induction, that the induction ceremony in which the oath was administered did not come until after the final physical examination, and that, consequently, if petitioner reported for the final physical examination, passed it, and then refused to report for induction,

he would be subject to arrest and imprisonment by the civil authorities for violating the terms of the Selective Service Act. Petitioner made the same inqpiry of others and received the same answer. His own examination of the Act and of the pertinant Selective Service Regulations convinced him that the answer was correct.

In due time petitioner was ordered to report to his draft board at Minneapolis, Kansas, for transportation to Ft. Leavenworth for the final physical examination and, if he passed it, for induction. In the belief that the previously mentioned information given him by the state draft officials was correct, and in the hope that he might be found to be physically unacceptable to the army and hence be permitted to go on teaching at the University of Texas instead of being sent to prison—petitioner decided to report for the final physical examination and, if he passed it, to turn himself over to the appropriate civil authorities for arrest and imprisonment for refusal to report for induction. Petitioner's every act thereafter was in conformity with that decision.

Petitioner departed from Austin, Texas for Kansas by airplane, but had to give up his seat at Dallas on account of military priorities, so he proceeded to Kansas City by train. Since it was too late to go to Minneapolis, Kansas, petitioner phoned his local board to find out by what bus the group from his county was proceeding to Ft. Leavenworth and to reiterate that if he passed the physical examination he was going to turn himself over to the civil authorities for arrest and imprisonment. The secretary of the draft board told petitioner over the phone that he would be reported delinquent for his failure to report to Minneapolis. Believing that he probably would pass the physican examination, petitioner next phoned the Kansas City offices of the U. S. Attorney, the U. S. Marshal, and the F. B. I. and told them he was going to Ft. Leavenworth to take the final physical examination and that if he pass d, i.

he was going to refuse to report for induction, and inquired to whom he should turn himself over for arrest and imprisonment.

Then petitioner went to Victory Junction, Kansas, where he met the rest of the group from his county and proceeded with them to Ft. Leavenworth. He slept overnight on the reservation and reported for his final physical examination the next morning along with the rest of the group from his county. During the course of the physical examination he was asked if he thought he would make a good soldier and replied that he would never serve in the army. At the conclusion of the physical examination petitioner was told that he had been put in Class 1-B and that he should go back to the checking station. Since not all the members of Class 1-B were being inducted into the army and since petitioner had left his suitcase at the checking station, he did not know whether or not he had been found acceptable. His eyes having been dilated during his physical examination he was unable to read what was written on the papers that he carried. He therefore asked a boy in overalls at the checking station what the papers said. The boy replied that, according to them, petitioner was supposed to be fingerprinted. Petitioner inquired whether or not fingerprinting involved induction, stating that, if it did, he would refuse to submit to it and turn himself over to the civil authorities for arrest and imprisonment. The boy said that he did not know but would find out from his superior officer. Petitioner accompanied the boy to the office of Captain Milligan and Lieut. Nemec to whom he reiterated what he had just said to the boy, explaining that he wished to remain outside military jurisdiction. Captain Milligan said that since the army had jurisdiction over the territory of the reservation, petitioner had entered military jurisdiction as soon as he entered the reservation. Petitioner called attention to the fact that there was a provision of the draft law to the effect

that a person was not subject to trial by court martial unless he had been "actually inducted into the army," and stated that he, the petitioner, would refuse to be inducted. The captain replied that petitioner could be inducted simply by reading the oath of induction in his presence and that that was what would be done. At the suggestion of Lieut. Nemec petitioner was then put under guard to prevent him from turning himself over to the civil authorities before the oath of induction could be read to him. However, before the oath was read, Captain Milligan permitted petitioner to phone the U. S. Marshal and the U. S. Attorney at Topeka, Kansas to whom he explained his predicament and asked what he could do under the circumstances. He was advised that the thing to do in such a case was to get a good lawyer and apply for a writ of habeas corpus. At petitioner's request the names of several lawyers were mentioned. One of the lawyers mentioned was William D. Reilly. Petitioner phoned him immediately, explaining the situation and requesting him to apply for the writ of habeas corpus. Over the phone Mr. Reilly requested the army officers to stay reading of the oath of induction until the writ could be drawn. This they refused to do.

Shortly after petitioner had finished talking to his lawyer he was ordered to stand and raise his right hand. This petitioner refused to do. Then, as he sat there under guard to prevent him from turning himself over to the civil authorities, petitioner was read the oath of induction: "Do you, Arthur Goodwyn Billings, solemnly swear ..... ?". Petitioner replied, "I do not; I refuse to take this oath!" One of the officers then retorted, "That doesn't make any difference, you are in the army now." Then petitioner was ordered by Lieut. Nemec to submit to fingerprinting and, when he refused to do so, was ordered locked up for courtmartial on a charge of refusing to obey a direct order to submit to fingerprinting. Before petitioner was actually taken away to the guardhouse, however,

his attorney, Mr. Reilly, arrived with the application for a writ of habeas corpus for him to sign. Then petitioner, still in civilian clothes, was put in the guardhouse.

At the hearing in the District Court petitioner testified at length. The attorneys for the respondent accepted petitioner's testimony there as to the facts with the addition of one sentence to which, save for one word, petitioner had no objection.

The District Court discharged the writ. The "statement of facts" contained in the court's written opinion was on many points at variance with the testimony accepted by both petitioner and respondent, and its opinion as a whole, petitioner feels, gave evidence of a lack of judicial objectivity. The court questioned whether petitioner's refusal to be inducted into the army (or anything else which petitioner had done or had refused to do) constituted a violation of the Selective Service Act for which he might be punished by civil courts. It ruled that induction occurred "by operation of law" and that nothing that a person, having passed the final physical examination, could say or do could prevent his induction, so that in spite of his refusal to be inducted, petitioner had been actually inducted and was therfore subject to trial by court martial. Petitioner appealed.

The Circuit Court of Appeals affirmed the decision of the Ditsrict Court discharging the writ, although its ruling as to the oath of induction differed somewhat from that of the lower court. Comment with regard to the Circuit Court's decision appears elsewhere in the present petition.

Since August 13, 1942 or thereabouts petitioner has been held prisoner at the Post Guardhouse at Fort Leavenworth. In October, 1942 he was charged, as if he were a soldier, with the additional offense or refusing while a prisoner to load some scrap iron.

Petitioner is quite ready to bear such punishment as the civil courts may impose for his willful refusal to be inducted into or to serve in the army and, if freed from the bonds of the military authorities, would carry out his original intention of turning himself over to the civil authorities for arrest and imprisonment.

The questions presented are all stated in the Assignment of Errors.

REASONS FOR ALLOWANCE OF THE WRIT.

1. This case involves a number of important questions of Federal law which have not been—but should, in petitioner's opinion, be—settled by the Supreme Court. The importance of the Selective Training and Service Act of 1940 and of the executive regulations bearing upon this case needs no demonstration. The interpretation of the crucial provisions surrounding induction is in question. In the event of induction into the army a citizen ceases to enjoy the rights guaranteed by the 5th and 6th amendments to the Constitution of the United States. If induction were to occur simply "by operation of law" as the District Court, sustained by the Circuit Court of Appeals, contends, then Congress by its unilateral action could deprive some or all of the citizens of this country of their most essential rights under the Constitution by inducting them into the army, and convert this country into a totalitarian military state in which the citizens would be little better than slaves. In petitioner's opinion it was not the intent of the framers of the Constitution to give Congress such powers.

Taking into consideration the pertinent provisions of the Selective Service Regulations, (Part 633.1 to 633.9 inclusive)

and of the Mobilization Regulations (1-7, Sections 5 and 6, and paragraph 13e), the decision of the Circuit Court would appear to be in direct conflict also with the intent of Section 11 of the Selective Training and Service Act of 1940 as that intent is manifested in the Congressional Record (Volume 86, Part 10, P. 10895). The relevant provision of Section 11 of the said Act is that "No person shall be tried by any military or naval court martial in any case arising under this Act unless such person has been actually inducted for the training and service prescribed under this Act . . ."

2. The Circuit Court of Appeals cites no precedent whatsoever for the decision in this case, and indeed there would appear to be no direct precedent involving exactly the same questions which this case involves. The following decisions, however, have some bearing on certain questions involved in this case:

VerMehren vs. Sirmyer
36th Federal Reporter (2d) P. 876
Stone vs. Christensen
36th Federal Supplement P. 739
United States vs. Powell
38th Federal Supplement P. 185
United States vs. Collura
(not yet reported)

Insofar as the above mentioned decisions have bearing upon the present case they would appear to conflict with the decision of the Circuit Court of Appeals, a review of which is being sought.

3. On at least one point the decision of the Circuit Court of Appeals would appear to be in conflict with the decision of the District Court which it affirms. The Circuit Court says (P. 6 of its decision):

> "Induction was completed when the oath was read to petitioner and he was told he was inducted into the army."

But the judge of the District Court (Pp. 14-16 of Transcript of Record) said:

> "Rules and regulations now in effect and in effect at the time the petitioner presented himself at Ft. Leavenworth carry no provision for the giving of an oath . . . . the giving of an oath and admonition that you are now in the army constitute mere formality."

4. In consideration of the fact (recorded in the evidence and admitted by the attorneys for the respondent) that BEFORE THE OATH OF INDUCTION WAS READ TO PETITIONER, HE ATTEMPTED TO TURN HIMSELF OVER TO THE CIVIL AUTHORITIES AND, after being put under guard, PHONED AN ATTORNEY TO INITIATE THE PRESENT HABEAS CORPUS ACTION—the decision of the Circuit Court to leave petitioner in the hands of the army is inconsistent with its own ruling that "Induction was completed when the oath was read to petitioner and he was told he was inducted into the army." It would appear to follow from this ruling that before the oath was read to petitioner and he was told that he was inducted into the army, he had not been "actually inducted" and hence was still subject to the jurisdiction of the civil authorities and that the army therefore had no right to put him under guard to prevent him from turning himself over to these authorities.

WHEREFORE, your petitioner respectfully prays that his petition be granted.

ARTHUR GOODWYN BILLINGS,
Petitioner in Propra Persona.

BRIEF IN SUPPORT OF PETITION

JURISDICTION.

The jurisdiction of this court to issue said writ is found in Sections 463-346-347, Title 28, U. S. C. A.

ASSIGNMENT OF ERRORS.

Petitioner contends that the Circuit Court of Appeals erred:

1. In asserting (P.2 of its decision) that petitioner believed that upon physical examination he "would be" rejected because of defective vision.

2. In asserting (Pp. 2 and 3) that petitioner inquired of anyone how he might comply with the order of his local draft board to report "for induction".

3. In asserting (P. 3) that it was with the consent of his local board that petitioner joined the group of selectees from his county at Victory Junction, Kansas.

4. In causing it to appear (P. 3) that it was not until after the oath of induction had been read to petitioner that he attempted to turn himself over to the civil authorities for arrest and imprisonment for refusal to report for induction and in failing to mention that the attempt fell through only because the military authorities put petitioner under guard to prevent him from turning himself over to the civil authorities.

5. In failing to mention that, after he had been put under guard but BEFORE THE OATH OF INDUCTION HAD BEEN READ TO HIM PETITIONER phoned the U. S. Marshal and the U. S. Attorney to find out how he could extricate himself from the hands of the military authorities and turn himself over to the civil authorities, and, at the suggestion of one of these civil officials, PHONED A LAWYER TO INI-

TIATE THE PRESENT HABEAS CORPUS ACTION.

6. In asserting (P.6) that petitioner actually did report "for induction".

7. In ruling by inference that the military authorities had not exceeded their rights when, before the oath of induction had even been read to petitioner, they put him under guard to prevent him from leaving the military reservation and from turning himself over to the civil authorities for arrest and imprisonment (for refusal to report for induction).

8. In ruling by inference that it was not even a violation of the Selective Service Act for petitioner to refuse to be inducted into the army.

9. In ruling (P. 6) that induction was completed when the oath was read to petitioner and he was told that he was inducted into the army.

10. In ruling by inference (P. 6) that the military authorities may by their unilateral action seize a man still in civil jurisdiction who refuses to be inducted into the army, and drag him across the induction boundary into military jurisdiction, that they may by their unilateral action deprive a citizen of his rights under the 5th and 6th amendments to the Federal Constitution in spite of anything that the citizen may do or say.

11. In failing to rule that to induct petitioner into the army (except in punishment of crime) would be to subject him to involuntary servitude in violation of his rights under the 13th amendment.

12. In affirming the decision of the District Court that the military authorities had jurisdiction over petitioner, and that he was subject to trial before a court martial.

13. In sustaining the decision of the United States District Court that petitioner had been inducted into the United States Army.

ARGUMENT.

Since the relevant facts of the case have been summarized in the "Statement of the Matter Involved" it would be superfluous here to correct the first four errors mentioned in the Assignment of Errors, all of which errors could, in petitioner's opinion, be proven by citations from the record of the hearing in the District Court. These citations are, unfortunately, too lengthy to include in the present brief. So petitioner will begin with the fifth item in the assignment of errors.

With Regard to the Fifth Assignment of Error:

A very important fact was omitted from the Circuit Court's account of the facts, namely, that before the oath of induction was read to him, petitioner, who had already been put under guard to prevent him from turning himself over to the civil authorities, phoned his attorney to apply for the writ of habeas corpus under consideration here. This fact appears in the record of the hearing, as follows (Pp. 29-31):

A. . . . . These gentlemen told me that they would order, just read the oath to me, and that would definitely make me a soldier in the army whether or not I swore to it, but before they did that they did allow me to phone the District Attorney. I said, "Is there anything I can do?" He said, "Well, the thing to do in a case like that is to try and get a writ of habeas corpus," and, he said, "Get a good lawyer."

Q. So you got Bill Reilly?

A. I told him I didn't know offhand the names of any federal lawyers in Leavenworth.

Q. They are all federal lawyers here.

A. Well, are they? I didn't know that, and I asked him to mention one and he said well, he couldn't recommend anyone, "That would be unethical." I said, "Will you please mention the names of several?" He mentioned four names and Mr. Reilly's was the first so I called Mr. Reilly and Mr. Reilly asked if they couldn't stay reading this order or oath to me for twenty-four hours until this writ could be drawn, and they said

nothing doing, they were going to read it right away.

Q. This army is in sort of a hurry apparently?

A. (continuing) And so about as soon as I hung up the receiver there they took me over to some other offices, an officer, and talked to him and then took me back again and then Lieut. Nemec got out this oath and he ordered me to stand up and I said I refuse to stand up. I sat there. He said, "I want you to raise your right hand," and I refused to raise my right hand, and then he read this oath, "Do you solemnly swear, and so on and so on." I said, "I do not. I refuse to take this oath." He said, "That doesn't make any difference, you are in the army now." . . .

This fact assumes considerable importance in view of the ruling of the Circuit Court as to when induction is completed.

With Regard to the Sixth Assignment of Error:

The very fact that petitioner took action to start this habeas corpus proceeding before the oath of induction was read to him refutes the assertion of the Circuit Court (P. 6) that petitioner reported "for induction". Suppose, reasoning by anology, that petitioner had been ordered to report for vaccination and, happening to be near the appointed building on the appointed day, dropped in to make an inquiry and to announce that he was refusing to report for vaccination or to be vaccinated. It would be ridiculous to say that he had fully complied with the terms of the order to report for vaccination and that he had actually reported for vaccination. Likewise in the present case, petitioner did not report for induction and moreover, did not at any time contemplate reporting for induction. The Collura case, cited on p. 16 has an important bearing on this point.

With Regard to the Seventh Assignment of Error.

The military authorities exceeded their rights when before the oath of induction had even been read to petitioner they put him under guard to prevent him from turning himself over to the civil authorities for arrest and imprisonment

for refusal to report for induction. Section 11 of the Selective Training and Service Act of 1940 provides that:

> "No person shall be tried by any military or naval court martial in any case arising under this act unless such person has been actually inducted for the training and service prescribed under this Act . . ."

It would appear to follow from this that up until a person has been "actually inducted" he is subject to the jurisdiction of the civil courts. Now, according to the reasoning of the Circuit Court (P. 6 of its opinion):

> "Induction was completed when the oath was read to petitioner and he was told he was inducted into the army."

But it would appear to follow even from the court's own reasoning that induction had not been completed, that petitioner had not been actually inducted, before the oath was read to him and he was told he was inducted into the army. Thus the petitioner not having been actually inducted into the army, was still under the jurisdiction of the civil authorities at the time he was put under guard by the army to prevent him from turning himself over to them. Thus the army authorities exceeded their rights when they put petitioner under guard to prevent him from turning himself over to the civil authorities for arrest and imprisonment for refusal to report for induction.

With Regard to the Eighth Assignment of Error:

It was a violation of the Selective Service Act of 1940 punishable in the civil courts for petitioner to refuse to be inducted into the army. The mere fact that induction under the law becomes compulsory at a certain point does not mean that refusal to be inducted into or to serve in the army would not be a violation of the law. The preceding steps,—registration, filing of questionnaire, and so on, are also compulsory and refusal to take any of these steps is unquestionably a vio-

lation of the law punishable in the civil courts by fine and imprisonment. Likewise with the crucial step of induction. Petitioner feels that refusal to be inducted into the army is as flagrant a violation of the Selective Service Act as refusal to pay taxes would be of the tax laws, and that having violated the Selective Service Act in this manner he should be turned over to the civil authorities for arrest and imprisonment.

With Regard to the Ninth Assignment of Error:

Induction was not completed when petitioner was read the oath and was told that he was inducted into the army. Mobilization regulation 1-7, Par. 13c, prescribes an induction ceremony "in which the men are administered the oath". Surely no oath can be said to be properly administered if the person to whom it is read refuses to take the oath. If it had been intended that a person refusing to be inducted or to take the oath of induction would be inducted anyway this would surely have been stated explicitly in the regulation. The court cites a vague provision of the regulations to the effect that a person refusing to take the oath "will be informed that this action does not alter in any respect his obligation to the United States." The very same information could be given to a man who refused to pay his federal taxes. Refusing to pay his taxes would not alter his obligation to pay them and he would therefore be subject to such punishment as the courts might impose for his violation of the law.

With Regard to the Tenth Assignment of Error:

The army authorities have no right to seize a person who is in civil jurisdiction where he enjoys the protection of the Fifth and Sixth Amendments and to drag him, in spite of his refusal to go, across the induction boundary into military jurisdiction where he is deprived of his rights under these amendments. Congress could not constitutionally have conferred

such a power on the military authorities even if it had wanted to. It was certainly not the intent of the framers of the Constitution to give Congress the power by its unilateral act to induct some or all of the citizens of the United States into the army "by operation of law", and thereby deprive them of the protection of the Bill of Rights, for to give Congress such a power would mean to give it the power to make a mockery of the entire Constitution and to make this government a military tyranny under which the citizens would enjoy no more rights than slaves.

With Regard to the Eleventh Assignment of Error:

Petitioner, confronted with the alternative of either doing what the draft law would require of him, or of being subjected to involuntary servitude in prison, as punishment for the "crime" of refusing to do what the draft law would require of him, has demonstrated by his choice of the latter that what the draft law requires would be for him involuntary servitude still more reprehensible than involuntary servitude in prison. It follows that it would be a violation of petitioner's rights under the Thirteenth Amendment to induct him into the army except in punishment of crime.

With Regard to the Twelfth and Thirteenth Assignments of Error:

If petitioner's contention is correct on any one of the above argued points, it would appear to follow logically that the Circuit Court of Appeals erred in affirming the decision of the District Court and that the application for a writ of certiorari is thoroughly warranted.

In the case of VerMehren v. Sirmyer, 36th Federal Reporter, (2d) page 876, the facts are that petitioner registered for the draft on June 15th, 1917. He claimed exemption which was not allowed, and was finally ordered up for physical

examination. He was never notified of the result of the physical examination,—at least the notice never reached him,—and they were not the notices required by the regulations. Petitioner failed to appear for entrainment. Charges were preferred against him before a general court martial and in October, 1918, he was found guilty of desertion, was sentenced to be dishonorably discharged and confined at hard labor for thirty years. While waiting to be transported to his place of confinement he escaped from the guard, and in 1929 voluntarily surrendered himself to the commanding officer at Fort DesMoines, Iowa, and immediately filed a petition for writ of habeas corpus. The writ was dismissed and appeal taken to the Circuit Court of Appeals of the Eighth Circuit. In the opinion of the court is the following at pages 881-882.

"The induction of a civilian into military service is a grave step, fraught with grave consequences. It means, among other things, that he is subject to military law instead of to the ordinary common and statutory law. A new status is taken on; he becomes a soldier; new responsibilities are assumed; failure to strictly meet those responsibilities is followed by extreme punishment. All this is quite right and necessary, and meets no criticism at our hands. But what we emphasize is the necessity that all the steps prescribed by statute, and by regulations having the force of law, shall be strictly taken before it can be held that a person has been lawfully inducted into the military service. In the case at bar those steps were not taken.

"We therefore hold that petitioner was never lawfully inducted into the military service; that the court-martial had no jurisdiction to try him as a deserter; that its judgment was void; that the District Court erred in not granting the writ of habeas corpus and discharging the petitioner. The order of the District Court is accordingly reversed, with directions to grant the writ of habeas corpus and discharge the petitioner."

VerMehren v. Sirmyer
36 F. (2d) 876-881

Petitioner contends that for refusal to report for induction, he is subject to trial and imprisonment not by the military, but by the civil authorities. The jurisdiction of the civil authorities in a case strikingly similar to the present one was sustained by the United States District Court for the Southern District of New York in a decision rendered in March of this year. The case was that of the United States vs. John Angelo Collura, which has not been reported.

Collura appeared at the Induction Station and stated that he was not reporting for induction unless the Army guaranteed that he would not be given any vaccinations or serums of any kind. The War Department refused to give such a guarantee and Collura then refused to submit to the final physical examination or to induction. Jurisdiction was assumed by the CIVIL authorities who charged Collura with refusal to report for induction. Collura, seeking release from the civil authorities, stated that he had reported for induction and would have submitted to induction if the Army had given the guarantee he asked. The court however sustained the claim of the civil authorities to jurisdiction, holding that while Collura HAD REPORTED AT THE INDUCTION STATION HE HAD NOT REPORTED FOR INDUCTION.

Now if even the CONDITIONAL refusal of Collura to submit to induction was punishable in the civil court, then your petitioner's UNCONDITIONAL refusal to submit to induction ought surely to be. Thus the recision in the Collura case lends strong support to petitioner's contention that the Circuit Court of Appeals erred in its decision in the present case.

Although the fact that your petitioner is earnestly opposed to war and conscription has been manifested both by his statement at the habeas corpus hearing and by his actions

(e. g. refusing to be inducted into or to serve in the army and refusing, even as a prisoner, to load scrap iron)—conscientious objection "by reason of religious training and belief" was not presented by him as a legal ground for granting his petition for a writ of habeas corpus. The legal grounds which he d'd present are, he is convinced, more than sufficient to warrant his release from the hands of the military authorities into the hands of the civil authorities. Moreover your petitioner was not, until recently, aware that a court might consider conscientious objection (of the type specified in the law) as a ground for the issuance of a writ of habeas corpus. He had presumed that the classification of the draft authorities was not subject to review in the court.

However, in the recent case of United States ex. rel. Phillips vs. Col. Downer (135 F 2d 521), a man holding ethical and humanitarian views strikingly similar to those of your petitioner, was released from the hands of the military authorities on the ground that he was, within the meaning of the law, a conscientious objector, "by reason of religious training and belief." Reversing the order of the District Court to quash the writ of habeas corpus, the Circuit Court of Appeals ruled that it was an error of law to deny Phillips classification as a conscientious objector.

Subsequent to the time when Phillips reported for the final pre-induction physical examination the facts in his case appear to differ from those in your petitioner's case in the following respect: Phillips was found physically fit for combattant service, whereas your petitioner was found physically fit only for non-combattant service; Phillips reported for and consented to submit to induction whereas your petitioner attempted to turn himself over to the civil authorities for arrest and imprisonment for refusal to report for induction and, after being put under guard, refused to submit to induction; Phillips consented to obey orders given to him as a soldier,

whereas your petitioner refused to obey any order given to him as if he were a soldier, even the trifling order to submit to fingerprinting, and refused to obey an order given to him as a prisoner to load some scrapiron. In these respects it would appear that the evidence of conscientious objection is more conclusive in your petitioner's case than in the case of Phillips.

Yet under the ruling of the Circuit Court in the Bowles case (3 Cir 131 F 2d 818) it appears that if Phillips had refused to report for or submit to induction the court might have refused even to consider the question of whether or not he was a conscientious objector within the meaning of the law. This ruling, seems to your petitioner, unreasonable, for it would appear to require that, before a man's claim to conscientious objection could ever be heard by the court, the objector must first prove to the court that his objection has not been strong enough or of such a nature as to cause him to refuse to comply with the law.

So much for the question of whether or not the court could consider a claim to conscientious objection of the type specified in the law as an additional legal ground for the issuance of a writ of habeas corpus in the present case. Assuming that the courts could consider it, there is considerable evidence in the record of your petitioner's actions and of his testimony which might be presented in support of such a claim.

The law provides special treatment only for those conscientious objectors who are opposed to war "by reason of religious training and belief." Interpreting the words quoted differently, honest men fully familiar with the background and convictions of your petitioner might differ on the question of whether or not he should be put in this category. Like most of the other members of the humanist wing of the Uni-

tarian church your petitioner is an agnostic. No organization to which he belongs has prescribed the stand which he has taken. He has taken it of his own accord. At the hearing before his draft board he was told that his objection to war and conscription was "rational rather than religious," and if the word "religious" is narrowly interpreted, that is true.

However if the word "religious" is interpreted broadly, as it was in the case of United States v. Kauten (2 Cir. 133 F 2d 703) your petitioner would contend that his objection to war and conscription is both rational and religious. In the Kauten case (at p. 708) the court found the language of the law on this point to refer to a belief "finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgression of its tenet."

It should be fairly evident that your petitioner did disregard elementary self-interest and put himself in for severe punishment and sanctimonious vituperation when he refused to submit to induction, refused to obey orders given to him as if he were a soldier, and refused even as a prsioner to load scrapiron. He would have run no great risk by going into the army, for he had been found physically fit only for non-combattant service. Moreover he was given to understand by the officers who interviewed him at the guardhouse that, in view of his exceptional educational qualifications, he would probably be an officer in a very short time, if he would consent to serve in the army. These facts are recorded in the testimony of the hearing. For a cynic or for one not conscientiously opposed to war the easy way would obviously have been to go into the army, but for your petitioner, that way was out of the question, simply unthinkable.

Your petitioner would submit that his refusal to take the course which self-interest indicated, bears witness to the

conscientiousness of his objection to what he was ordered to do.

Further evidence as to the exact nature of your petitioner's conscientious objection to war and conscription is to be found in the following excerpt from his testimony at the habeas corpus hearing:

F. "I believe in the common sense of Christianity. I believe that the rules that attributed to Christ are the best rules. I am firmly convinced that they are the best rules of human conduct. But I have been very doubtful, I do not believe, frankly, that Christ was divine. But that hasn't shaken my belief in these principles, which stand on their own feet, I think." (P 14 of the typewritten transcript of the hearing in the District Court.)

"Ghandi, I think, has the right idea. He tells the Indian people: The British have wronged you, that is true, but you must not hate them. Recognize that they are misguided and in your actions toward them, don't act as if you hated them. Just refuse to cooperate. (op. cit. P 19.)

"Sir I don't think that it is a question of submitting and becoming slaves to these countries. I believe that they should be resisted, but without hatred. I am resisting what I regard as a fascist institution in this country, the army — by similar methods by refusing to cooperate with them. They may ultimately sentence me to a firing squad. But they can't go on with that forever. They can't put all the people in a country in prison. That is why if peaceful resistance were really tried, it would work." (op cit. p. 20)

"I believe that there are limits beyond which no government, even a democracy, has the right to go in infringing upon the rights of the individual . . . No government has the right to make him a slave, to make him commit murder. That is what the government is ordering me to do now, to go out and shoot people, or since I would be just a non-combattant, to serve as an accomplice in the murder of people whom I have never even seen, whom if I met them on the street I might like just as well as many of the people of this country." (op. cit. p 21).

These excerpts from the testimony of your petitioner together with the record of his actions should, he feels give the court a fair idea of the nature and intensity of his opposition to war and conscription. Although your petitioner will never consent to serve in the army, he would like nothing better, particularly in these troubled times, than to serve humanity in general, and his country in particular, in a manner consistent with his convictions, and he hopes that ~~if he is finally sent to~~ at least in prison, the Government will find it possible to put to some use his rather good education and his knowledge of foreign languages.

It is of course for the court to decide whether or not to consider the petitioner's objection to war and conscription as an additional legal ground for granting his petition. For his part, your petitioner remains convinced that the legal grounds presented at the initiation of the habeas corpus proceeding are more than sufficient to warrant his release from the hands of the military authorities into the hands of the civil authorities.

I would respectfully request that my petition for a writ of certiorari be granted.

ARTHUR GOODWYN BILLINGS,
Petitioner

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 215.

ARTHUR GOODWYN BILLINGS, PETITIONER,

VS.

KARL TRUESDELL, MAJOR GENERAL, UNITED STATES ARMY.

BRIEF FOR THE PETITIONER.

ARTHUR GOODWYN BILLINGS,
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LEE BOND,
Of Counsel.

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BRIEF FOR THE PETITIONER.

STATEMENT OF THE MATTER INVOLVED.

The petitioner registered under the Selective Training and Service Act of 1940 with the Ottawa County, Kansas, draft board, but stated on his registration card that he would never serve in the army (R. 12). With his questionnaire he filed the form provided for conscientious objectors, stating therein his reasons for opposing war and conscription. He was first put in class 1-B on account of defective eyesight, then in 1-H on account of his age, and finally (with the general reclassification which followed this country's official entrance into the war) in class 1-A. The law permitted the con-

testing of this last classification and petitioner contested it. He was accorded a hearing at which he was allowed to set forth his reasons for opposing war and conscription. [Although this was not mentioned in the testimony, petitioner asked the members of his draft board if they thought they could tell the difference between those whose rights we were fighting to protect and those whom they were willing to have killed and maimed in order to achieve "Victory." One of the members of the board expressed the view that he would recognize Japanese, Germans or Italians. Petitioner then showed the members of the board photographs he had taken abroad and had carefully selected with a view to such an experiment. They took a fat and scowling Englishman for a German; a gentle looking old German who was feeding a pigeon out of his hand for an Englishman; a slinky looking Chinaman for a Japanese; a kindly looking Japanese teaching his little girl how to ride a tricycle for a Chinese; a Finn for a Russian, and so on.] Petitioner stated, among other things, that, while he was an agnostic with regard to theology, he believed in the fundamental rightness and soundness of the teachings attributed to Jesus with regard to human conduct. He was told that his objection to war was rational rather than religious (R. 12) and was reminded that the draft law provided special treatment only for those who object to war "by reason of religious training and belief."

The board decided not to change its classification. Petitioner appealed. As in all such cases, the F. B. I. conducted an investigation. Then petitioner was called to Wichita for a hearing before Mr. Yankey, state appeal agent of the Department of Justice in cases involving conscientious objectors. Mr. Yankey, having looked over the report of the F. B. I., told petitioner that there was no question as to the sincerity of his objection, but that the question was whether it was the intent of the law to cover an objection such as your petitioner's under the

phrase "by reason of religious training and belief," petitioner being avowedly a free thinker on theological matters (R. 13). [Although this was not brought out in the evidence, Mr. Yankey seemed impressed by the fact that petitioner's was not just a personal objection to being drafted himself, but that he questioned the authority of the government to draft anybody, and by the fact that petitioner was not even certain that he would prefer a camp for conscientious objectors to (civil) prison, since he believed that he might register a more effective protest against war and conscription by being sent to prison for deliberately violating the draft law than he could by being sent to a camp for conscientious objectors in compliance with the law. After the hearing Mr. Yankey invited petitioner to dine with him and said that he was having difficulty in making up his mind what to recommend to the board of appeals. Petitioner replied that he was not sure himself whether or not it was the intent of the law to classify one with his convictions as an objector "by reason of religious training and belief."] The board of appeals sustained the classification of the local board.

Petitioner, while determined never to serve in the army, had no desire to go to prison for violating the draft law if under the terms of that law he might not be found physically fit for service in the army anyway. So petitioner, who was then teaching at the University of Texas in Austin, made inquiries of the army officers in charge of the state draft headquarters in that city as to whether he could take the final physical examination without becoming subject to military jurisdiction if he should pass the physical examination and refuse to report for induction (R. 24 and 31). He was told by these draft officials that no one was subject to trial by court martial unless he had been "actually inducted" into the army, that one was not inducted until he subscribed to the oath of induction, that the induction ceremony in which the oath was administered did not come until after the final phys-

ical examination, and that, consequently, if petitioner reported for the final physical examination, passed it, and then refused to report for induction, he would be subject to arrest and imprisonment by the civil authorities for violating the terms of the Selective Service Act. Petitioner made the same inquiry of others and received the same answer. His own examination of the Act and of the pertinent Regulations convinced him that the answer was correct.

In due time, petitioner was ordered to report to his draft board at Minneapolis, Kansas, for transportation to Ft. Leavenworth for the final physical examination and, if he passed it, for induction (R. 18). [This order was later torn up by petitioner to make it impossible for the Army to fill in the blank on the reverse side, and was submitted as an exhibit at the hearing (R. 18).] In the belief that the previously mentioned information given him by the state draft officials was correct, and in the hope that he might be found to be physically unacceptable to the army and hence be permitted to go on teaching at the University of Texas instead of being sent to prison —petitioner decided to report for the final physical examination and, if he passed it, to turn himself over to the appropriate civil authorities for arrest and imprisonment for refusal to report for induction. Petitioner's every act thereafter was in conformity with that decision.

Petitioner departed from Austin, Texas, for Kansas by airplane, but had to give up his seat at Dallas on account of military priorities, so he proceeded to Kansas City by train. Since it was too late to go to Minneapolis, Kansas, petitioner phoned his local board to find out by what bus the group from his county was proceeding to Ft. Leavenworth and to reiterate that if he passed the physical examination he was going to turn himself over to the civil authorities for arrest and imprisonment. The secretary of the draft board told petitioner over the phone that he would be reported delinquent for his failure to

report to Minneapolis (R 18). Believing that he probably would pass the physical examination, petitioner next phoned the Kansas City offices of the U. S. Attorney, the U. S. Marshal, and the F. B. I. and told them he was going to Ft. Leavenworth to take the final physical examination and that if he passed it, he was going to refuse to report for induction, and inquired to whom he should turn himself over for arrest and imprisonment (R. 31-32).

Then petitioner went to Victory Junction, Kansas, where he met the rest of the group from his county and proceeded with them to Ft. Leavenworth. He slept overnight on the reservation and reported for his final physical examination the next morning along with the rest of the group from his county (R. 19). During the course of the physical examination he was asked if he thought he would make a good soldier and replied that he would never serve in the army (R. 20). At the conclusion of the physical examination petitioner was told that he had been put in Class 1-B and that he should go back to the checking station. Since not all the members of Class 1-B were being inducted into the army and since petitioner had left his suitcase at the checking station, he did not know whether or not he had been found acceptable. His eyes having been dilated during his physical examination he was unable to read what was written on the papers that he carried. He therefore asked a boy in overalls at the checking station what the papers said. The boy replied that, according to them, petitioner was supposed to be fingerprinted (R. 21). Petitioner inquired whether or not fingerprinting involved induction, stating that, if it did, he would refuse to submit to it and turn himself over to the civil authorities for arrest and imprisonment. The boy said that he did not know, but would find out from his superior officer. Petitioner accompanied the boy to the office of Captain Milligan and Lieut. Nemec to whom he reiterated what he had just

said to the boy, explaining that he wished to remain outside military jurisdiction. Captain Milligan said that since the army had jurisdiction over the territory of the reservation, petitioner had entered military jurisdiction as soon as he entered the reservation. Petitioner called attention to the fact that there was a provision of the draft law to the effect that a person was not subject to trial by court martial unless he had been "actually inducted into the army," and stated that he, the petitioner, would refuse to be inducted. The captain replied that petitioner could be inducted simply by reading the oath of induction in his presence and that that was what would be done (R. 22). At the suggestion of Lieut. Nemec petitioner was then put under guard to prevent him from turning himself over to the civil authorities before the oath of induction could be read to him (R. 21, 29). However, before the oath was read, Captain Milligan permitted petitioner to phone the U. S. Marshal and the U. S. Attorney—at Topeka, Kansas—to whom he explained his predicament and asked what he could do under the circumstances (R. 21-22). He was advised that the thing to do in such a case was to get a good lawyer and apply for a writ of habeas corpus. At petitioner's request the names of several lawyers were mentioned. One of the lawyers mentioned was William D. Reilly. Petitioner phoned him immediately, explaining the situation and requesting him to apply for the writ of habeas corpus. Over the phone Mr. Reilly requested the army officers to stay reading of the oath of induction until the writ could be drawn. This they refused to do (R. 22 and 33).

Shortly after petitioner had finished talking to his lawyer he was ordered to stand and raise his right hand (R. 22). This petitioner refused to do. Then, as he sat there under guard to prevent him from turning himself over to the civil authorities, petitioner was read the oath of induction: "Do you, Arthur Goodwyn Billings, solemnly swear . . . ?" Petitioner replied, "I do not; I

refuse to take this oath!" One of the officers then retorted, "That doesn't make any difference, you are in the army now." Then petitioner was ordered by Lieut. Nemec to submit to fingerprinting and, when he refused to do so, was ordered locked up for courtmartial on a charge of refusing to obey a direct order to submit to fingerprinting. Before petitioner was actually taken away to the guardhouse, however, his attorney, Mr. Reilly, arrived with the application for a writ of habeas corpus for him to sign (R. 22-23). Then petitioner, still in civilian clothes, was put in the guardhouse (R. 23).

Since August 13, 1942, or thereabouts, petitioner has been held prisoner at the Post Guardhouse at Fort Leavenworth. In October, 1942, he was charged, as if he were a soldier, with the additional offense of refusing while a prisoner to load some scrap iron. This is not recorded in the testimony because it occurred after the hearing in the District Court.

Petitioner is quite ready to bear such punishment as the civil courts may impose for his willful refusal to be inducted into or to serve in the army and, if freed from the bonds of the military authorities, would carry out his original intention of turning himself over to the civil authorities for arrest and imprisonment.

COMMENTS WITH REGARD TO OTHER STATEMENTS OF FACT SUBMITTED IN THIS CASE.

It will be noted that the foregoing statement of fact is in quite close accord with that of the certiorari Brief for the Respondent in Opposition. That these two statements would be in accord was indeed to have been expected in view of the announcement in the respondent's original brief to the District Court that:

> Respondent is willing to accept the statement of facts made by petitioner with the important exception that after petitioner had refused to subscribe to the oath tendered to him, that he was then informed that he

was accepted as and was then a soldier of the United States Army.*

There were quite a few hiatuses, obscurities and inaccuracies in the typewritten copies of the stenographic record of petitioner's testimony, but in the statement of facts in the certiorari brief for the respondent there was only one sentence in which petitioner's testimony as to the facts was misinterpreted. From this sentence (p. 4) it would incorrectly have appeared that before the oath of induction was read to petitioner, and even before he was put under guard, he had been given an "order" to submit to fingerprinting and had been told that he was already "in the army." Before the events mentioned petioner had indeed been told, by an enlisted man in overalls, that he had to be fringerprinted (R. 21) and had indeed been told, by Captain Milligan; that, being on the military reservation he, petitioner, was in military jurisdiction. But it was not until after petitioner (who already had been put under an armed guard to keep him from turning himself over to the civil authorities and had by phone retained an attorney to initiate habeas corpus proceedings) had been read, and had refused to take, the oath of induction, that he was for the first time told that he was in the army; and it was not until after this that petitioner was given the direct order (to submit to fingerprinting) with refusing to obey which, he is charged for courtmartial (R. 4). The misinterpretation above mentioned was similar to one thrice repeated by the judge of the District Court (R. 39, 45 and 49).

When these misinterpretations of petitioner's testimony, and the two hiatuses or obscurities in the type-

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*As petitioner recalls it, he was told only "That doesn't make any difference, you are in the army now" (R. 22), but he would agree to the respondent's supplement to his testimony provided that the word "told" be substituted in it for the word "informed" (which might imply that what he was told was correct).

written copy of the stenographic record which had caused them, were called to the respondent's attention—he consented through his legal representatives to the two minor corrections which petitioner requested, to clear up the obscurities in the record as to these facts—so that, as it now stands printed the record of the testimony on these points (R. 21 and 22) is unambiguous.

Otherwise the terse and objective statement of facts in the Brief for the Respondent in Opposition (on the certiorari petition) was in perfect accord with the statement of your petitioner on all facts mentioned by them both. However, each statement mentioned some details not mentioned by the other. For instance, while your petitioner supplied a few minor details not included in the testimony, he did not mention in his statement the autobiographical data brought out at the hearing, but the respondent's statement contained the following excellent summary of this data:

> Petitioner is thirty-two years of age (see Tr. 11). He graduated from the University of Kansas in 1933, spent two years at the University of Paris, served three years in the American Embassy in Moscow under Ambassadors Bullitt and Davies, traveled for four months in China and Japan in 1938, studied three years at Harvard University, receiving a master's degree and completing two thirds of the work toward a doctorate, and became a member of the economics faculty of the University of Texas in 1941.

(This biographical data may help to explain some of petitioner's convictions. He has with his own eyes seen some of the tragic results of the first world war "to make the world safe for democracy" and he knows perhaps a little more than does the average citizen about the background of the present war in which we fight for the "four freedoms," allied with the dictator who was so recently dividing the spoils of Europe with Hitler, with the dictator who has so long been trying to "liberate"

Finland of its democracy, with the dictator in whose country your petitioner for three years searched hopefully and thoroughly for some evidence of growing democracy, and found instead overwhelming evidence of increasing suppression of the most elementary democratic rights.)

The points at which the written opinion of the Circuit Court of Appeals in this case found in the 105 F. 2d, p. 505, conveys an impression at variance with the facts are listed in the first six assignments of error in your petitioner's certiorari brief. The testimony with regard to the facts in question is so objectively summarized in the certiorari Brief for the Respondent in Opposition that further comment with regard to them here would be superfluous.

The District Court, in its Memorandum Opinion and in its order discharging the writ of habeas corpus, conveyed an impression on many points at variance with the facts. The legitimate misinterpretation (R. 39, 45 and 49) of the faulty stenographic record of petitioner's testimony as to the sequence of events has already been mentioned. The District Court's other misinterpretations of petitioner's testimony were in his opinion not so legitimate. Moreover, the Court conveyed an incorrect impression by failing even to mention several important facts—for instance, the fact that, before the oath of induction was ever read to petitioner, he had been put under arrest to keep him from turning himself over to the civil authorities and had by phone retained an attorney to initiate habeas corpus proceedings (R. 21 and 22). In fact, petitioner feels that at the hearing, and in its Memorandum Opinion, the District Court gave every evidence of a lack of judicial objectivity. Typical of the District Court's opinion are its statements:

(1) With regard to the physical fitness of your petitioner for military service. According to the Judge of the District Court (R. 39):

> Petitioner is a single man with no dependents. He is thirty-one years of age, six feet tall, and weighs 165 pounds. To all appearances he is a well developed, able-bodied man.

Since the court fails to mention the fact that petitioner was found physically fit only for non-combatant service (R. 15 and 21) the erroneous impression is conveyed that fear for life and limb might have had something to do with petitioner's refusal to submit to induction into the army. Actually, now and in the future, he would probably have fared much better materially by going into the army. Petitioner was given to understand by the officers who interviewed him that if he would consent to serve in the army, he might, in view of his exceptional educational qualifications, soon be a Captain (R. 33 and 34). Although this was not mentioned in the evidence, he was also told that he would not have to serve outside the continental United States.

(2) With regard to the nature of petitioner's objection to war. According to the Judge of the District Court (R. 39):

> It appears that instead of being a conscientious objector under the regulations and the law, petitioner is an agnostic, as found by the draft board.

As Captain Browne correctly pointed out (R. 8), the law provides special treatment only for those who object to war "by reason of religious training and belief" and the failure of the draft authorities to put petitioner in Class 4E did not constitute a finding that petitioner was not a conscientious objector at all. In fact, Mr. Yankey, the state appeal agent of the Department of Justice in cases involving conscientious objectors, after looking over the reports of the F. B. I. concerning petitioner, said that there was no question as to the sincerity of petitioner's opposition to war (R. 13). As for the fact that petitioner is an agnostic, the draft board had no occasion to "find" this; petitioner volunteered the information.

(3) With regard to petitioner's allusion to Socrates. According to the Judge of the District Court (R. 40) petitioner "likens himself to Socrates." This might convey the impression that petitioner had boastfully likened his abilities to those of the great Greek philosopher. But such was not the case. (Petitioner's allusion to Socrates came in answer to the Court's question as to why petitioner wished to submit to trial in any court. Petitioner understood the court to imply that since he was disobeying the law he should, to be consistent, try to evade punishment. In attempting to explain his attitude on this matter, petitioner cited the example of Socrates who, rejecting the opportunity to evade the death penalty by fleeing from his prison at night, stayed and drank the hemlock. That was the only sense in which petitioner "likened himself to Socrates" (R. 25).

(4) With regard to petitioner's refusal to obey the draft law. According to the Judge of the District Court (R. 40), petitioner "refuses to conform to or abide by any law of the United States that does not suit his whim." It would be interesting to know how the Judge would have attempted to reconcile his statement with the fact that up to the present instance petitioner had never been arested for, or charged with, the violation of any law of the United States or any subdivision thereof. Petitioner did state (R. 17) that there are certain limits beyond which no government, even a democracy, has any right to go infringing upon the rights of the individual, that "no government has the right to make him a slave, to make him commit murder," and that this was what the government was ordering him to do, to kill people, or since he would be just a non-combatant, to serve as an accomplice in the murder of people whom he had never even met, of people whom he might like, if he knew them, as well as he does many of the people of this country. It is something far deeper and far stronger than

a mere "whim" which has made the petitioner refuse to submit to induction into the army.

The Judge of the District Court further characterizes petitioner's attitude as follows:

> The spirit of petitioner is one of rebellion against the laws of the United States, against his government. The effect of his action and those of others like him is to hinder the war effort the government deems necessary in this distressing emergency. . . The purpose and effect of such an attitude would be so plain that it would be impossible not to conclude that such citizens were at heart traitors to their country.

The District Court has this to say of those who themselves refuse to obey the conscription law, but refrain from counseling others to do so. It would be interesting to know what the Judge of the District Court would have said of Daniel Webster who, on December 9, 1814, when the country was in far more imminent peril than it is today, in Congress said the following with regard to conscription:

> . . . In my opinion it ought not to be carried into effect. The operation of measures thus unconstitutional and illegal ought to be prevented by a resort to other measures which are both constitutional and legal. It will be the solemn duty of the State Governments to protect their own authority over their militia, and to interpose between their citizens and arbitrary power. These are among the objects for which the State Governments exist; and their highest obligations bind them to the preservation of their own rights and the liberties of the people. I express these sentiments here, sir, because I shall express them to my constituents. Both they and myself live under a constitution which teaches us that the doctrine of nonresistance against arbitrary power and oppression is absurd, slavish, and destructive of the good and happiness of mankind. With the same earnestness with which I now exhort you to forbear these measures, I shall exhort them to exercise their unquestionable

right of providing for the security of their own liberties (see Appendix).

The formula which the District Court applies to your petitioner would have made Daniel Webster "at heart a traitor to his country." Further comment with regard to the formula is superfluous.

(5) With regard to your petitioner's opinion as to the Pearl Harbor attack. The Judge of the District court (R. 47) misrepresents petitioner as saying that "Japan was justified (partly) in such treacherous attack." But what petitioner actually said was this (R. 15):

> I think this was very treacherous on the part of the Japanese. However, I think that it was not without a certain amount of provocation from their point of view, because Secretary Knox a month before had boasted that American Army fliers on leave from the Army Air Corps were dropping American made bombs from American made planes on the Japanese in China. When we were fighting in Nicaragua, if Tojo had boasted that Japanese fliers were dropping Japanese made bombs from Japanese made planes on the American troops in Nicaragua, I believe we would have regarded it as a pretext or cause for war.*

It might be added that last Fall our own government staged a surprise attack all too reminiscent of Pearl Harbor, on the North African colonies of France. Under the cloak of normal diplomatic relations with the Vichy government we stealthily whetted the dagger of invasion, and in the worst Japanese tradition, announced the blow to Vichy after it had been struck. Of course, it must be remembered that we really came as friends of the French people, but it must not be forgotten that the Japanese claim, and have

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*In the stenographic record of this statement (R. 15) there are several errors. In particular the word "army" appears twice where the word "American" should be and the word "perfect" appears where the word "pretext" should be.

found people in Burma and the Philippines who give the appearance of believing that it is the purpose of the Japanese army to "liberate" the Far East from "white domination." It is easy for a nation to see the mote in an enemy eye but difficult for it to perceive the beam in its own.

(6) With regard to petitioner's willingness to serve his country. According to the Judge of the District Court (R. 47):

> We like to believe that when danger threatens the country every individual citizen will come forward immediately and do his duty. Not so with this petitioner . . . it is difficult to understand how such apparent disloyalty could abide in the soul of a human being, . . .

From this the erroneous inference might be drawn that petitioner would not voluntarily serve his country. At the hearing in the District Court petitioner said, in answer to one of the Judge's insults (R. 37):

> Sir, I am willing to do anything to help my country, but I don't think it helps my country to promote this war.

Petitioner meant exactly what he said. He is willing to do anything to help the country, but he refuses to prostitute his knowledge and talents for an endeavor which he believes to be harmful to humanity in general and his country in particular, an endeavor as wrong in principle as is wholesale and indiscriminate murder. In petitioner's opinion the war will be no more beneficial to his country than a feud would be to his family. But just as the father of a feuding family might draw the erroneous conclusion that any son who would not lend a hand in the indiscriminate murder of people who happened to have been born in the opposing family, so the Judge of the District Court apparently draws the conclusion that any American is disloyal who refuses to assist in the indis-

criminate murder of the men, women, and children who happen to have been born in the countries with which this country is at war. The son of a feuding family who, resisting the folly of his parents, seeks means to bring about a reconciliation with the opposing family, may be serving his family better than the equally well-meaning son who, at the risk of his own life, "satisfies the family honor" by revenge, and thereby stirs up new hatreds in the opposing family which may in turn result in the murder of further members of his own family; likewise the citizen who resists the folly of his government. As Confucius is reported to have said:

> When the command is wrong, a son should resist his father, and a minister should resist his august master. The maxim is, 'Resist when wrongly commanded' (from the Hsio King).

Petitioner urges the following assignments of error being part of the ones set out in his Petition for Certiorari:

6. In asserting (p. 6) that petitioner actually did report "for induction."

7. In ruling by inference that the military authorities had not exceeded their rights when, before the oath of induction had even been read to petitioner, they put him under guard to prevent him from leaving the military reservation and from turning himself over to the civil authorities for arrest and imprisonment (for refusal to report for induction).

8. In ruling by inference that it was not even a violation of the Selective Service Act for petitioner to refuse to be inducted into the army.

9. In ruling (p. 6) that induction was completed when the oath was read to petitioner and he was told that he was inducted into the army.

10 In ruling by inference (p. 6) that the military authorities may by their unilateral action seize a man still in

civil jurisdiction who refuses to be inducted into the army, and drag him across the induction boundary into military jurisdiction, that they may by their unilateral action deprive a citizen of his rights under the 5th and 6th amendments to the Federal Constitution in spite of anything that the citizen may do or say.

11. In failing to rule that to induct petitioner into the army (except in punishment of crime) would be to subject him to involuntary servitude in violation of his rights under the 13th amendment.

12. In affirming the decision of the District Court that the military authorities had jurisdiction over petitioner, and that he was subject to trial before a court martial.

13. In sustaining the decision of the United States District Court that petitioner had been inducted into the United States Army.

DIRECT ARGUMENT.

I.

Petitioner is punishable in civil courts for his deliberate violation of the Selective Training and Service Act of 1940 and of Executive regulations having the force of law.

In the Selective Training and Service Act of 1940 and in regulations having the force of law the federal government laid out a path for certain categories of citizens to follow from civilian life into the army, and made each step along this path, beginning with registration, compulsory—the compulsion consisting in the threat of punishment by civil courts for failure to take any step up to and including induction, and in the threat of punishment by court martial for failure to take any step after the completion of induction. Congress set forth these threats of punishment in Section 11 of the Act (50 U. S. C. 311) and, by providing that "no person shall be tried by any military or naval court martial in any case arising under this act unless such person has been actually inducted for the training and service prescribed," clearly drew the boundary line between persons subject to civil jurisdiction and persons subject to military jurisdiction, making subject to the latter only those selectees the induction of whom had been completed.

Because of its effect induction would thus appear to be one of the most important steps prescribed by the Act. The selectee who has not taken this step is still a civilian, subject to the jurisdiction of the civil courts, but the man who has taken the step is a soldier subject to the jurisdiction of court martial.

The very word "induction" indicates that it is a step which is to be taken by the selectee and which cannot be taken for him. It means literally the process of lead-

ing (into), and, as used in the Selective Service Act, it indicates a process whereby the selectee is led, not dragged, into the army, taking the step himself, albeit under the leadership of an officer and under the threat of punishment set forth in Section 11 of the Act for refusal to take it. The official definition of the word is in conformity with its literal meaning. According to the Federal Register (Vol. 5, No. 187, p. 3780, par. 102), "Induction is the process by which the men selected for military service pass from the status of civilians to the status of members of the armed forces." The use of the active voice, ("pass," not "are passed," clearly implies that, if taken at all, the step of induction is to be taken by the selectee himself and not by somebody else.

The provisions for induction—detailed in Mobilization Regulation 1-7, par. 13e, and in Article of War 109 as interpreted by the highest judicial authority—bear witness to the importance of induction by making it the only step in which the selective service procedure the taking of which is solemnized by a ceremony, and confirm the impression given by the very meaning of the word that the step is to be taken by the selectee and cannot be taken for him. Mobilization Regulation 1-7, par. 13e, provides that the induction (*i. e.*, the leading of the men into the army) will be performed by an officer "in a short ceremony in which the men are administered the oath, Article of War 109." Article of War 109, in turn, prescribes that every soldier shall "take" the oath at the time of his enlistment and—in language reminiscent of the previously-cited official definition of induction—the Supreme Court has held (*U. S.* v. *John Grimley*, 137 U. S. 636) that "the taking of the oath of allegiance is the pivotal fact which changes the status of the recruit from that of civilian to that of soldier."

The threat of punishment for failure to take any of the prescribed steps of the selective service procedure was insufficient to intimidate your petitioner into taking the crucial step of induction. He refused to take the step

which would have changed his status from that of civilian to that of soldier, refused to take the oath of induction, and did not even report for induction. Having refused to take the step which would have changed his status, petitioner remains a civilian, but by the same token he has violated the law and is therefore subject to the punishment threatened in Section 11 of the Selective Training and Service Act. It matters not whether the charge be refusing to report for induction or refusing to submit to induction, they both amount to the same thing, and there is sufficient evidence in petitioner's own testimony at his habeas corpus hearing to convict him in a civil court on either count.

II.

No military official is authorized by Mobilization Regulation 1-7, Par. 13e, to arrest and drag into the Army a civilian who refuses to be inducted.

The respondent does not deny that petitioner refused to take the step which would have changed his status from that of civilian to that of soldier, but contends in effect that the Army, having captured petitioner on the military reservation, had the authority to hold petitioner under arrest and by its unilateral act to change his status from that of civilian to that of soldier, and thereafter to courtmartial him for refusing to obey military orders. This contention is based primarily on the provisions of Mobilization Regulation 1-7, Par. 13e, and in particular on the last sentence of section (4). The relevant provisions of this Regulation are as follows:

e Induction Ceremony—

(1) All men successfully passing the physical examination will be immediately inducted into the army. The induction will be performed by an officer in a short, dignified ceremony in which the men are administered the oath, Article of War 109:

* * * * * * *

(4) They will be informed that they are now members of the Army of the United States and given an explanation of their obligations and privileges. In the event of refusal to take the oath (or affirmation) of allegiance by a declarant alien or citizen he will not be required to receive it, but will be informed that this action does not in any way alter his obligation to the United States.

The Article of War involved in section (1) of the Regulation cited reads as follows:

Act 109 *Oath of Enlistment*—At the time of his enlistment every soldier shall take the following oath (or affirmation): "I, ..., do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to the rules and Articles of War." This oath may be taken before any officer.

It will be recalled that, in interpreting this oath requirement of the Articles of War the Supreme Court held in *U. S.* v. *John Grimley* (137 U. S. 636), that

"The taking of the oath of allegiance is the pivotal fact which changes the status of the recruit from that of civilian to that of soldier."

In the light of this ruling and of the provisions of Mobilization Regulation 1-7, par. 13e, and of Article of War 109, an examination may be made of the respondent's contention that section (4) of the Regulation authorizes the Army, after it has captured a civilian selectee on its reservation, to hold him under arrest, and, when he refuses to be led (inducted) into the Army, legally to drag him in by reading the oath of induction in his presence and telling him, when he refuses to take the oath, "That doesn't make any difference, you are in the army now." Section (1) of the Regulation provides that

the men are to be "inducted," *i. e.*, led, taking the step themselves (not dragged) into the army in a ceremony in which they are "administered" (not just read) the oath, "Article of War 109." This Article, in turn, provides that every man shall "take" (not just be read) the oath at the time of his enlistment, and it will be noted that by the ruling in the Grimley case it is the "taking" of the oath (not the reading of it by somebody else) that changes the status of a man from that of civilian to that of soldier.

An examination may now be made of Section (4) of the Regulation. "They," as used in the first sentence of this section, clearly refers to the men to whom the oath has been "administered" in accordance with the provisions of Section (1) of the Regulation and of Article of War 109. "They" to whom the oath has been administered in accordance with these provisions and who by "taking" the oath, have, under the ruling in the Grimley case, changed from the status of civilian to that of soldier —"they" are informed that "they" are now members of the Army.

But "he," as used in the second sentence of section (4), "he" to whom, because he has refused to take it, the oath has *not* been administered in accordance with the provisions of Section (1) of the Regulation and of Article of War 109, *he* who has refused to be led (inducted) into the Army, refused to take the step which, according to the ruling in the Grimley case, would have changed his status from that of civilian to that of soldier —*he* will not be required to take it (no physical violence will be used to attempt to make him take it), but instead of being informed like the others that he is now a member of the Army of the United States, *he* who has not become a member of the Army will be informed that his refusal to take the step which would have made him a soldier "does not alter in any respect his obligation to the United States."

Similar information could be given to a person refusing to do anything else that was obligatory. Refusing to stop at a red light does not alter in any respect a driver's obligation to stop, and he may therefore be punished for refusing to do so. If a man liable to the payment of federal taxes put his resources beyond the reach of the government and then refused to pay his taxes he might be informed in the very words of the above quoted regulation that "this action does not alter in any respect his obligation to the United States" and that he is therefore subject to such punishment as the courts may impose for his refusal to fulfill the obligation. For like reason your petitioner is punishable in civil courts for his refusal to fulfill the obligation imposed by the Selective Training and Service Act.

It is barely conceivable, in petitioner's opinion, that the last sentence in section (4) might without excessive violence to the intent of the Regulation be applied to a selectee who would not refuse to be inducted into the Army, but who would refuse to take the step in the particular form of an oath or an affirmation—although in view of the specific provisions for the "taking" of the oath it is unlikely that the Regulation was intended to apply in such cases. But to read into Mobilization Regulation 1-7, par. 13e, what the respondent contends is arbitrarily to read into it something that simply is not there. Mobilization Regulation 1-7, par. 13e, neither explicitly nor implicitly authorizes the army, after it has captured a civilian selectee on its reservation, to hold him under arrest and, when he refuses to be led (inducted) into the army, legally to drag him in by reading the oath of induction in his presence and telling him, when he refuses to take the oath, "That doesn't make any difference you are in the army now."

III.

Even if some executive regulation had specifically authorized the army without a sworn warrant to arrest a civilian selectee who had refused to report for or to submit to induction, and by its unilateral action to change the selectee's status from that of civilian to that of soldier and thereafter to courtmartial him for refusing to obey military orders—such a regulation would have been in direct conflict with a provision of the Selective Training and Service Act, and therefore null and void.

By providing in Section 11 of the Act that "no person shall be tried by any military or naval court martial unless such person has been actually inducted for the training and service prescribed" Congress clearly prohibited the trial by court martial of anyone who had not been actually inducted, of anyone who had not assumed the status of a soldier.

The purpose of this prohibition would obviously be defeated if the Army were permitted to arrest a civilian selectee who had had refused to be inducted, and by its unilateral act to "induct" him—for this would amount to permitting the army, by its unilateral act, to subject a man whom it was prohibited from courtmartialing to a process which would permit it to courtmartial him, and any executive regulation which might have had this effect would consequently have been null and void.

The mere fact that petitioner happened to be on a military reservation at the time of his arrest did not in any relevant respect increase the authority of the army over him. The status of a civilian selectee on a military reservation under the provisions of the Selective Training and Service Act is comparable to that of an American citizen in China under the old extra-territorial treaties. The Selective Training and Service Act expressly prohibits trial by courtmartial of any person who has not been "actually inducted" into the Army, but permits the

trial by courtmartial of a former civilian has been "actually inducted" into the Army. The old extra-territorial treaties prohibited trial of American citizens by Chinese courts, but permitted the trial by Chinese courts of former Americans who had become naturalized citizens of China. Now, suppose that the Chinese government had arrested an American citizen who had refused to become a Chinese citizen and, by its unilateral act, against the American's unceasing protest, had "naturalized" him a Chinese citizen, and had then given him an order to kowtow to the emperor, an order which he had refused to obey. It would be absurd for the Chinese government to say that the American was not being kept in confinement for any act committed prior to his "naturalization," but for his continued refusal to obey a lawful Chinese order to kowtow to the emperor, and it is equally absurd for the Army to assert that petitioner "is not being kept in confinement for any act committed prior to induction, but for his continued refusal to obey a lawful military command to be fingerprinted" (Respondent's certiorari brief p. 10). The Chinese government would obviously have violated the terms of the extra-territorial treaty, and the Army has just as obviously violated the terms of the Selective Training and Service Act.

The army, having exceeded its authority under the Selective Training and Service Act, is unlawfully holding your petitioner for courtmartial.

IV.

Even if the terms of the Selective Training and Service Act had permitted the issuance of an Executive Regulation authorizing the army: without a sworn warrant to arrest a selectee, to deprive him of his right to trial by jury, and to put him into involuntary military servitude—such a Regulation would have been unconstitutional on at least three counts, and therefore null and void—unless such Regulation applied only to selectees who prior to

their arrest by the military authorities had implicitly waived their Constitutional rights as civilians by themselves assuming, freely or under legal threat of punishment, the conflicting obligations of soldiers, as set forth in the oath of enlistment.

Your petitioner does not here challenge the Constitutionality of the Selective Training and Service Act or of the Executive Regulations issued pursuant thereto as he interprets them. He does not here challenge the power of Congress to make refusal to take any step in the Selective Service Procedure a crime punishable by fine and imprisonment. It is a principle that has, rightly or wrongly, been firmly established by the Supreme Court decisions, that Congress may, by compulsion, in the form of a threat of fine and imprisonment, induce (or attempt to induce) men to take upon themselves the obligations of soldiers and thereby to renounce their conflicting rights as civilians.

What your petitioner does contend, however, is that if the Army had, from any source, received authorization for the fascistoid procedure which it used, or attempted to use, against him—that authorization would have been unconstitutional on at least three counts:

(1) In the Fourth Amendment to the Constitution freedom from arbitrary arrest is guaranteed. This amendment reads as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unlawful searches and seizures shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the places to be searched, and the persons or things to be seized.

In violation of his rights under this amendment your petitioner was unlawfully, without a warrant, seized by the respondent's subordinates and put under an armed

guard to prevent him from leaving the military reservation and turning himself over to the civil authorities before the Army authorities could stage the high-handed procedure which they euphemistically call "induction."

It might be argued that seizure of a person *in flagrante delicto* is an exception to the rule requiring a warrant for arrest, but this argument is not open to the respondent, for to argue this would be to admit that petitioner had been arrested for an offense not punishable by court-martial, since the brazen "ceremony" by which the Army claims it "actually inducted" your petitioner did not take place until after petitioner was put under arrest.

(2) In Article III, Section 2, paragraph 3, of the Constitution, the rule is laid down that "The trial of all crimes except impeachment shall be by jury. . ." The Sixth Amendment repeats this rule by providing that "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury . . ."

An exception to this rule of trial by jury was perhaps implied by the following provisions of the Sixth Amendment with regard to indictment by Grand Jury:

> No one shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger . . .

However, if an exception to the rule of trial by jury was implied by this Amendment, it was even more clearly implied that trial by jury was to remain the rule, and trial by court martial—a narrowly circumscribed exception, an exception which at the time of the adoption of the Amendment could have applied only to an army composed solely of volunteers who, by voluntarily assuming the obligations of soldiers, had presumably waived any conflicting rights which they might have had as civilians.

It was certainly not the intent of the framers of the Constitution to give Congress the power to abolish the rule of trial by jury and to make a rule of the exception of trial by courtmartial. It was certainly not the intent of the framers of the Constitution to give Congress the power by its unilateral act to induct some or all of the citizens of the United States into the Army "by operation of law" (R. 45), and thereby to deprive them of the protection of the Bill of Rights, for to give Congress such a power would be to give it the power to make a mockery of the entire Constitution and to convert our government from a democracy into a military tyranny under which the citizens would have no more rights than slaves. Not having this power itself Congress could not constitutionally have conferred it upon the Army.

So your petitioner could not have been, and hence was not, "by operation of law," inducted into the army and thereby deprived of the right to trial by jury which, even under the legal threat of punishment, he had refused to give up. Unlawfully and in violation of his Constitutional rights he is being held for courtmartial as if he were a soldier.

(Your petitioner would respectfully suggest that, at a time when the possibility of "total conscription" has already been seriously mentioned in Congress, the responsibility of the Supreme Court for reserving to the citizens of this country, the protection of the Bill of Rights, except where they themselves waive this protection by submitting to induction, is of the utmost gravity.)

(3) In the first paragraph of the Thirteenth Amendment the rule is laid down that:

> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.

If your petitioner had explicitly (by taking the oath of induction) or implicitly (by conducting himself as if

he had taken it) taken upon himself the obligations of a soldier, it might reasonably be held that he had thereby himself renounced his conflicting civilian rights under the Thirteenth Amendment. But your petitioner did not take the oath of induction, and did not at any time conduct himself as if he had taken it. He refused, even under compulsion in the form of the legal threat of fine and imprisonment, to take upon himself the obligations of a soldier and thereby to renounce his conflicting rights as a civilian.

Surely, in view of the language of the Thirteenth Amendment, it could hardly be denied that a prisoner at hard labor is presumably in involuntary servitude.

Your petitioner, confronted with the limited alternative of either doing what the draft law would require of him or of being subjected to involuntary servitude in a civil prison, as a punishment for the "crime" of refusing to do what the draft law would require of him, has demonstrated by his choice of the latter that what the draft law prescribes would be for him involuntary servitude still more reprehensible than involuntary servitude in prison. It follows that it would have been a violation of your petitioner's rights under the Thirteenth Amendment to have put him into the Army (except in punishment of crime) and that he was not lawfully inducted into the Army.

This is not the first time that the issue of involuntary servitude has been raised in connection with the application of conscription. But in the cases previously decided the contention has been that, under the provisions of the Thirteenth Amendment, conscription was unconstitutional in principle. The Supreme Court has, rightly or wrongly, refused to sustain so far-reaching a contention, and no such contention is repeated here. Your petitioner repeats that he does not challenge the power of Congress by compulsion, in the form of a threat of fine and imprisonment, to induce, or to attempt to induce, men to take

upon themselves the obligations of soldiers. He does not here challenge the power of Congress to make refusal to take any step in the selective service procedure a crime punishable by fine and imprisonment. All that petitioner contends on this point is that under the provisions of the Thirteenth Amendment, the Army cannot constitutionally drag into involuntary military servitude a man who absolutely refuses to be inducted and who is ready to suffer such punishment as a civil court may inflict for his refusal to be inducted. No previous Supreme Court decision has any direct bearing on this contention.

Moreover, the question of whether a man drafted into the Bolshevik, American or Nazi armies is in voluntary service or involuntary servitude is *not a question of law which could with justice be decided by any court once and for all.* As the derivations of the words voluntary and involuntary themselves suggest, this is a question of fact which cannot be resolved without reference to the will (volonté) of the individual involved. For one German patriot what the Nazi draft law requires might appear to be voluntary service, the performance of a patriotic duty—but for an equally patriotic German who is convinced that war is a wrong and self-defeating means of attempting to defend the "rights and honor" of his nation, what the same Nazi draft law requires would certainly be involuntary servitude to which he would feel it his patriotic duty to refuse to submit, even though such refusal might cost him his very life. An analogous proposition would hold for other countries including our own.*

Several decisions (in addition to those already mentioned) may be presented in support of the foregoing arguments:

In the case of *United States* v. *Powell,* (38 Fed. Supp. 185) the court made the following statement:

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*See in the Appendix Daniel Webster's remarks on the question of whether or not conscription is constitutional.

> The function of the writ of habeas corpus is to release a person unlawfully restrained of his liberty. Submission to that restraint under protest as in the case at bar obviously should not deprive one of that right. That the petitioner should subject himself to charges of desertion at the instance of the military authorities in order to preserve his inherent right to release from unlawful restraint upon habeas corpus is a requirement far too exacting to be projected into this field of the law without direct authority therefore.
>
> We do not think that Filomio's conduct constituted a waiver of civil relief; he submitted with unequivocal protest; he refused to take the oath of induction and we conclude that he could not have more peremptorily demonstrated his objections without forcibly resisting induction—this he was not required to do.

In the case of *Stone* v. *Christensen* (36 Fed. Supp. 739) Stone refused to register for the draft and asked for a declaratory judgment to the effect that he need not register, the grounds being that "registration will subject Stone to military training and he will thereby be deprived of liberty and property without due process of law and that he will undergo involuntary servitude, in derogation of the Federal Constitution, and will suffer damage thereby." The court held:

> . . . If he had registered he would not be subject to military law nor liable to court martial *until after induction, which includes swearing allegiance.* Prior to that time he is still entitled to protection of any rights he may have by the civil tribunals. . .

In the case of *VerMehren* v. *Sirmeyer*, 36 F. 2d 876, the petitioner registered for the draft on June 15, 1917. He claimed exemption, which was not allowed, and was finally ordered up for physical examination. He was never notified of the result of the physical examination—at least the notice never reached him—and the notice was not such as required by the regulations. Petitioner failed to appear for entrainment. Charges were preferred

against him before a general court martial and in October, 1918, he was found guilty of desertion, was sentenced to be dishonorably discharged and confined at hard labor for thirty years. While waiting to be transported to his place of confinement he escaped from the guard, and in 1929 voluntarily surrendered himself to the commanding officer at Fort Des Moines, Iowa, and immediately filed a petition for writ of habeas corpus. The writ was dismissed and appeal taken to the Circuit Court of Appeals of the Eighth Circuit. In the opinion of the court is the following at pages 881-882:

> The induction of a civilian into military service is a grave step, fraught with grave consequences. It means, among other things, that he is subject to military law instead of to the ordinary common and statutory law. A new status is taken on; he becomes a soldier; new responsibilities are assumed; failure to strictly meet those responsibilities is followed by extreme punishment. All this is quite right and necessary, and meets no criticism at our hands. But what we emphasize is the necessity that all the steps prescribed by statute, and by regulations having the force of law, shall be strictly taken before it can be held that a person has been lawfully inducted into the military service. In the case at bar those steps were not taken.
>
> We therefore hold that petitioner was never lawfully inducted into the military service; that the court-martial had no jurisdiction to try him as a deserter; that its judgment was void; that the District Court erred in not granting the writ of habeas corpus and discharging the petitioner. The order of the District Court is accordingly reversed, with directions to grant the writ of habeas corpus and discharge the petitioner.

In the case of *United States* v. *Collura* (not yet reported), decided on March 3 in the District Court for the Southern District of New York, the question of whether reporting at an induction station necessarily constituted reporting for induction was involved. Collura reported

at an induction station but balked when it became apparent that he would soon have to be vaccinated. He said that he was not going any further unless the Army guaranteed not to vaccinate him. The Army would give him no such guarantee so he refused to proceed any further. He was charged by the *CIVIL* authorities with refusing to report for induction. In his defense he contended that he had reported for induction, that his refusal to submit to induction was only conditional, and that he would submit to induction if the army would guarantee not to vaccinate him. However Collura was convicted of refusing to report for induction, and on March 3, 1943, was sentenced to three years in prison by Judge Henry W. Goddard (Collura appealed but no decision has as yet been handed down).

Now if even the *CONDITIONAL* refusal of Collura (after he had reported at the induction center) to submit to induction was punishable in a civil court, then your petitioner's *UNCONDITIONAL* refusal to submit to induction ought surely to be.

V.

(Tentative argument not presented to the lower courts.)

Prior to the time when petitioner came to Ft. Leavenworth to take the physical examination, the draft authorities may have committed an error of law in failing to put him in Class 4E.

Although the fact that your petitioner is earnestly opposed to war and conscription has been manifested both by his statement at the habeas corpus hearing and by his actions (*e. g.*, refusing to be inducted into or to serve in the army and refusing, even as a prisoner, to load scrap iron)—and although the fact that the petitioner is a conscientious objector was mentioned (R. 6) in the reply, submitted for him by his attorney, to the respondent's

return to the writ of habeas corpus—conscientious objection "by reason of religious training and belief" was not presented by him as a legal ground for granting his petition for a writ of habeas corpus. The legal grounds which he did present are, he is convinced, more than sufficient to warrant his release from the hands of the military authorities into the hands of the civil authorities. Moreover your petitioner was not, until recently, aware that a court might consider conscientious objection (of the type specified in the law) as a ground for the issuance of a writ of habeas corpus. He had presumed that the classification of the draft authorities was not subject to review in the court.

However, in the recent case of *United States ex rel. Phillips* v. *Col. Downer* (135 F. 2d 521), a man holding ethical and humanitarian views strikingly similar to those of your petitioner, was released from the hands of the military authorities on the ground that he was, within the meaning of the law, a conscientious objector, "by reason of religious training and belief." Reversing the order of the District Court to quash the writ of habeas corpus, the Circuit Court of Appeals ruled that it was on error of law to deny Phillips classification as a conscientious objector.

Subsequent to the time when Phillips reported for the final pre-induction physical examination the facts in his case appear to differ from those in your petitioner's case in the following respects: Phillips was found physically fit for combatant service, whereas your petitioner was found physically fit only for non-combatant service; Phillips reported for and consented to submit to induction whereas your petitioner attempted to turn himself over to the civil authorities for arrest and imprisonment for refusal to report for induction and, after being put under guard, refused to submit to induction; Phillips consented to obey orders given to him as a soldier, whereas your petitioner refused to obey any order given to him

as if he were a soldier, even the trifling order to submit to fingerprinting, and refused to obey an order given to him as a prisoner to load some scrapiron. In these respects it would appear that the evidence of conscientious objection is more conclusive in your petitioner's case that in the case of Phillips.

Yet under the ruling of the Circuit Court in the *Bowles* case (3 Cir., 131 F. 2d 818), it appears that if Phillips had refused to report for or submit to induction the court might have refused even to consider the question of whether or not he was a conscientious objector within the meaning of the law. This ruling, seems to your petitioner, unreasonable, for it would appear to require that, before a man's claim to conscientious objection could ever be heard by the court, the objector must first prove to the court that his objection has not been strong enough or of such a nature as to cause him to refuse to comply with the law.

So much for the question of whether or not the court could consider a claim to conscientious objection of the type specified in the law as an additional legal ground for the issuance of a writ of habeas corpus in the present case. Assuming that the courts could consider it, there is considerable evidence in the record of your petitioner's actions and of his testimony which might be presented in support of such a claim.

The law provides special treatment only for those conscientious objectors who are opposed to war "by reason of religious training and belief." Interpreting the words quoted differently, honest men fully familiar with the background and convictions of your petitioner might differ on the question of whether or not he should be put in this category, and petitioner himself has had some doubt as to whether or not it was the intent of the law to classify an objector like himself as an objector "by reason of religious training and belief." Like most of the other members of the Humanist wing of the Unitarian

church your petitioner is an agnostic. No organization to which he belongs has prescribed the stand which he has taken. He has taken it of his own accord. At the hearing before his draft board he was told that his objection to war and conscription was rational rather than religious (R. 12), and if the word "religious" is narrowly interpreted, that is true.

However if the word "religious" is interpreted broadly, as it was in the case of *United States* v. *Kauten* (2 Cir., 133 F. 2d 703), your petitioner would contend that his objection to war and conscription is both rational and religious. In the *Kauten* case (at p. 708) the court found the language of the law on this point to refer to a belief "finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgression of its tenets."

It should be fairly evident that your petitioner did disregard elementary self-interest and put himself in for severe punishment and sanctimonious vituperation when he refused to submit to induction, refused to obey orders given to him as if he were a soldier, and refused even as a prisoner to load scrapiron. He would have run no great risk by going into the Army, for he not had been found physically fit for combatant service. Moreover, he was given to understand by the officers who interviewed him at the guardhouse that, in view of his exceptional educational qualifications, he would probably be an officer in a very short time, if he would consent to serve in the army (R. 33-34). These facts are recorded in the testimony of the hearing. For a cynic or for one not conscientiously opposed to war the easy way would obviously have been to go into the Army, but that way was absolutely out of the question for your petitioner.

Your petitioner would submit that his refusal to take the course which self-interest indicated, bears witness to the conscientiousness of his objection to what he was ordered to do.

The general nature of petitioner's objections to war and conscription has been indicated by his actions (refusal to submit to induction into or service in the army and refusal even as a prisoner to load scrap iron), by his testimony at the habeas corpus hearing (in particular R. 12-17), and by remarks scattered through this brief. However he feels that there are several points on which he should make his attitude more clear:

(1) Even if your petitioner favored war, he would oppose conscription. Under such a system the power to make war is divorced from the responsibility for fighting the war. While a majority of the populace enriches itself out of this war, the able bodied young men of the country are asked to risk life and limb at fifty dollars a month in a war which they had nothing to do with causing, for a "victory" which many of them will never live to see, for a victory the fruits of which will be bitter indeed to their widows and orphans or to their old-maided sweethearts, as the case may be. The only form of conscription in which the power to decide upon war would be associated with the responsibility for fighting it would be one wherein a referendum on war was held, with the provision that all those who voted for war would thereby volunteer to serve in the front line trenches and to put their entire fortunes at the disposal of the government.

In your petitioner's opinion if the populace of a country decides upon war they should be willing either to volunteer or to tax themselves sufficiently to pay salaries which will induce others to volunteer, and if it turns out that the highest salary which the taxpayers are willing to pay is insufficient to make men willing to volunteer, it would appear to follow logically that the populace, all considered, is not willing to wage war, and Congress should govern itself accordingly.

Although believing conscription for war to be wrong in principle, petitioner (rejecting the thought of incon-

sistently taking one of the many draft exempt war jobs for which he was well qualified), reluctantly followed the path laid out by the Selective Training and Service Act until there was absolutely no alternative but to go into a non-combatant branch of the Army or to refuse to do so and take the consequences.

If one may judge from the Speech on the Conscription Bill, cited in the Appendix, Daniel Webster would have violated the law more flagrantly and at an earlier stage. And Webster is not the only man in American history who would stand by what he believed to be right even if it meant violation of the law. The example of the socialist Eugene V. Debs in the last war is well known. Less well known is the example of Henry David Thoreau, author of Walden Pond, who—as a protest, not against conscription it is true, but against another form of slavery, negro slavery—refused even to pay his taxes. Thoreau refused to pay his taxes because the Union permitted slavery and Massachusetts, the state in which he resided, remained in the Union. He was put in the Concord (Massachusetts) jail and remained there until some well-meaning anonymous friend, without Thoreau's advice or consent, paid the tax for him, a gesture of which Thoreau bitterly complained. While Thoreau was still in jail his friend, Ralph Waldo Emerson, came to see him, and asked, "Henry, why are you here?" To this the prisoner replied, "Ralph, why are you *Not* here?!" Thoreau elsewhere explained his attitude in the following words:

> I know this well, that if one thousand, if one hundred, if ten men whom I could name—if ten honest men only—aye, if one honest man, ceasing to hold slaves, were actually to withdraw from this copartnership (with the state by not paying taxes) and be locked in the county jail therefor, it would be the abolition of slavery in America. For it matters not how small the beginning may seem to be, what is once well done is done forever . . . . Under a govern-

ment which imprisons any unjustly, the true place for a just man is also a prison (Quoted in the Kansas City Times, March 2, 1931).

In contrast to Thoreau your petitioner, perhaps wrongly, did not go out, so to speak, to pick a fight with the-powers-that-be by refusing to pay his taxes. Petitioner docilely paid them (although, when officially informed by the administration of the University at which he was teaching that he was "expected to" invest a certain percentage of his salary in war bonds, he quietly but firmly refused so to invest his money, and, instead, gave it outright to the student loan fund). Petitioner even registered for the draft (although he wrote on the registration card that he would never serve in the army) and allowed himself to be bullied (by the threat of the draft law) into going up to the very brink of the cliff of induction, before he balked. And even then, there would have been no legal contest between petitioner and the-powers-that-be, if he had been allowed to turn himself over to the civil authorities, to plead guilty of refusing to report for or submit to induction, and to take whatever punishment the civil courts might see fit to impose. But when the military authorities brazenly put petitioner under arrest and undertook to yank him over the induction boundary into military jurisdiction, they asked for trouble, and your petitioner has been happy to accommodate them. Thus, by their own high-handed action the military authorities actually provoked and enabled your petitioner to register a far more resounding protest against war and conscription than would otherwise have been possible, and for this your petitioner is grateful to them, no matter what may happen to him personally as a result of this protest.

(2) Unlike many religious objectors to war, your petitioner is not an absolutist on the question of killing. Draft boards frequently ask objectors a test question some-

thing like this: "If you were convinced that the only way you could save the lives of a thousand men would be to kill a homicidal maniac who was about to kill them, would you kill the maniac?" It seems that many religious objectors say that they would not kill the maniac, that "the Lord giveth and the Lord taketh away," and that it is not for a human being to decide who is to live and who is to die. But your petitioner replied to a similar question (at the hearing before his draft board) that under such circumstances he would without hesitation kill the homicidal maniac. In petitioner's opinion it would be quite irrational for a humane person not to kill under such circumstances for in this hypothetical case he is confronted with the limited alternative of being responsible for the death of one person or the deaths of a thousand, and certainly the former is the lesser of the two evils. It might here be remarked however, that when draft boards ask such questions it is implied that wars save lives; whereas in fact, the reverse is the case. It would be difficult, if not impossible, to find a war in history which has saved lives on either of the contesting sides. When violence is met with violence then murder, rape, and other crimes of violence occur (R. 16) as for example in Russia, Finland, Poland and other countries which have by violence "defended themselves" in this war. In Denmark the loss of life has been trifling by comparison. By refusing to "defend" the country by violence the Danish government saved the lives of its soldiers and preserved the homes of its civil population, and regardless of the outcome of this war petitioner doubts whether, all considered, this will ever be regretted by the Danish people. (This does not mean that the Danish people are not resisting the German occupation. They are; but on the whole not by violent means, but by keeping their heads erect, endeavoring to persuade the Nazis that they are in the wrong, and refusing to cooperate with them.)

(3) Although your petitioner is not an "absolutist" on the question of killing, he can imagine nothing sufficient to justify the wholesale and indiscriminate murder and mayhem of war. Moreover he doubts whether the average soldier on either side could possibly be so cruel as to carry out his orders if he had personally to inflict the torture which the shells that he fires or the bombs that he drops inflict. The airman who flies high over London, Berlin, Moscow, Helsingfors, Tokyo, or Pearl Harbor moves a lever and watches his bombs go plummeting down to the target below. There is a burst of flame, and debris flies upward and outward. Over the roar of his motors he barely hears the thunder of the explosion. He does not have to hear the agonizing screams of his victims. He does not have to see kind and gentle women who might remind him of his mother, or his sister, or his sweetheart, die writhing in agony from the horrible wounds he has inflicted. He does not have to see the little children whom he has condemned to go through life blind or deaf, minus an arm or a leg, or with a hideously disfigured face. He does not have to watch others, pinned under the wreckage of their homes, slowly burned to death by the flames which his bombs have started. He returns to his base and reports to his superior officer that the raid was "very successful" and the statisticians of his army prepare figures which some of his hate intoxicated fellow citizens will actually gloat over—five thousand killed, ten thousand injured, twenty thousand homeless, "very successful."

Your petitioner does not profess to be a Christian but he finds it difficult to understand how those who do profess to be Christians in the warring countries can reconcile their religion with participation in a war so brutal as this. In petitioner's view Christianity is as inconsistent with war as Mark Twain implied in his "War Prayer":

> "O Lord our God, help us to tear their soldiers to bloody shreds with our shells; help us to cover their

> smiling fields with the pale forms of their patriot dead; help us to drown the thunder of the guns with the groans of their wounded, writhing in pain; help us to lay waste their humble homes with a hurricane of fire; help us to wring the hearts of their unoffending widows with unavailing grief; help us to turn them out roofless with their little children to wander unfriended through wastes of their desolated land in rags and hunger and thirst, sport of the sun flames of summer and the icy winds of winter, broken in spirit, worn with travail, imploring Thee for the refuge of the grave and denied it—for our sakes, who adore Thee, Lord, blast their hopes, blight their lives, protract their bitter pilgrimage, make heavy their steps, water their way with their tears, stain the white snow with the blood of their wounded feet! We ask of One who is the spirit of love and who is the ever faithful refuge and friend of all that are sore beset, and seek His aid with humble and contrite hearts. Grant our prayer, O Lord, and Thine shall be the praise and honor and glory, now and ever. Amen" (Life of Mark Twain, Albert Bigelow Paine, Vol. III, p. 1232).

The inconsistency of Christianity with war is, in your petitioner's view, equally well illustrated by the Thanksgiving prayer of an American Army pilot in Italy, a prayer as near to the spirit of Christianity as it is far from the spirit of war. According to the newspaper report (Kansas City Star, December 2, 1943) the 22-year-old veteran said:

> "Dear God, bless all the fighting men on all the fronts around the world—on both sides—because they are all fighting for what they believe is right. . ."

Your petitioner ventures to suggest that if the belligerent governments had the eye to see and the heart to understand this great truth, that their opponents are *"all fighting for what they believe is right"*—the war would end immediately, not in an illusory "victory" of one side over the other, but in a real victory for humanity.

And in your petitioner's opinion war is just as inconsistent with democracy as it is with Christianity.

What could be more inconsistent than to use an army of slaves to bring the "four freedoms" to the rest of the world?! If it appear that, since the soldier gets fifty dollars a month, this is an exaggeration, let the status of the conscript and that of the slave be compared in other respects. Your petitioner does not know what penalty could have been imposed upon a slave for striking his master or for refusing to obey his master's orders but according to the sixty-fourth article of war:

> "Any person subject to military law who, on any pretense whatsoever, strikes his superior officer or draws or lifts up any weapon or offers any violence against him, being in the execution of his office, or willfully disobeys any lawful command of his superior officer, shall suffer death or such other punishment as a courtmartial may direct."

(In other words, if the shell-shocked private whom General Patton struck had struck back or had disobeyed his orders there would be nothing in the Articles of War to prevent a courtmartial from sentencing the private to death for the offense.) Your petitioner does not know what was the maximum penalty which could have been imposed upon a runaway slave, but according to the fifty-eighth Article of War a runaway soldier in time of war shall suffer "death or such other penalty as a courtmartial may direct." The soldier is asked to risk his own life in attempts to kill or maim others, the slave was not asked to do this. The soldier is torn away from his family, but the slave was not as a rule taken away from his wife and children. It is true, of course, that those soldiers who survive the war will be restored to their freedom and that they will probably get pensions of some kind or other (but those who are badly wounded or disfigured may live out their lives less happily than a healthy slave, and others may find themselves "free" to be unemployed and to be driven out of Washington by tear gas as were their predecessors of the first World War).

Nor is the use of an army of slaves to bring the four freedoms to the rest of the world the only political inconsistency in this war. Our most powerful ally, the one which has so long been seeking to "liberate" Finland of its democracy, is a dictatorship which, so far as your petitioner was able to observe in three years in Moscow, would make about as good a guardian for civil liberties as a wolf would for sheep.* Our other great ally joins in proclaiming the four freedoms, but when Ghandi, taking the proclamation seriously, asks for freedom now for India, he is thrown in prison for his insolence. And in our own country we find as the ardent champions of racial minorities elsewhere the same Senators who a few years ago filibustered to prevent the passage of an anti-lynching bill which might have helped to protect the rights of American negroes, Senators a few of whom come from states in which it is actually the racial majority that is deprived of the right to vote. And likewise we find that some of those who rightly denounce Hitler for herding unoffending Jewish people into concentration camps have with equal vigor championed the policy whereby our own government deprived unoffending Japanese Americans of their homes and fields and herded them like criminals into concentration camps, solely because it was from Japan that their trusting ancestors had come to this "land of the free."

During the war of 1812 Daniel Webster said, "Those who cry out that the Union is in danger are themselves the authors of that danger," and it would appear to your petitioner that, similarly, some of those who, pointing

*Petitioner is well aware of the much publicized "democratic" constitution of the Soviet Union. In fact your petitioner translated that constitution for the State Department and was at the time hopeful enough to think that it might possibly mean a little of what it said about freedom of speech, freedom of religion, etc. But he was sadly disillusioned by subsequent events such as the "democratic elections" in which there was nowhere more than one "candidate" for any office.

abroad today shout the loudest that our democracy is in danger are, at home, themselves the authors of the gravest threat to our democracy.

(4) Although, like many other members of the Unitarian church, your petitioner is an agnostic—he believes that he is perhaps more firmly convinced of the fundamental soundness and practicality of Christ's teachings than are some professed Christians.

In your petitioner's view the ethical system of the Old Testament which sanctifies our instinctive reactions to an outrage such as Pearl Harbor, is a system oriented toward the past, a system for RESPONDING TO THE ACTIONS OF OTHERS, "eye for eye, tooth for tooth" (Exodus 21:33). "Do (in the present) unto others as they have (in the past) done unto you," is its rule.

But the ethical system of the New Testament, on the other hand is a system oriented toward the future a system for CONTROLLING THE ACTIONS OF OTHERS. "Do unto others (in the present) as you would have them do unto you" (in the future) is its Golden Rule. The practicality of this rule, in your petitioner's opinion, lies precisely in the fact that it recognizes that "with what measure ye mete, it shall be measured to you again" (Matthew 7:2), that it recognized *the natural tendency of others* to respond, and *to think it right and honorable to respond, according to the Old Testament rule* of "an eye for an eye, a tooth for a tooth," which implies also a favor for a favor, a kindness for a kindness. The principle of the Golden Rule appears in the scriptures of the other great religions of the world. For instance in the Buddhist Drammapada appears the precept: "Let a man overcome anger by love, let him overcome evil by good; let him overcome the selfish by generosity, the liar by truth."

So far as your petitioner has been able to observe, the Golden Rule is the best rule to follow in relations with the individuals of every country, and he sees no rea-

son to assume that it would not be the best rule to follow in relations between states. Wherever he has gone he has observed that a smile is almost invariably answered with a smile, a frown with a frown, an insult with an insult, and a favor with a favor. Sometimes he has enjoyed favors in return for kindnesses done by his fellow countrymen long before. Once in the town of Kavkazkaya in the south of Russia, when your petitioner was detained by the G. P. U. (because he had questioned and photographed the ragged, sick and hungry widow and children of a "liquidated" individual farmer), his release was effected by an officer who privately informed your petitioner afterward that his own family had been saved from starvation in 1921-22 by the American relief organization. In a village nearby where your petitioner spent a couple of weeks visiting a collective farm, several middle-aged people stopped him on the street to shake hands with him and thank him as an American for assistance which they had received during the same famine of 1921-22. These people had remembered this in spite of the malicious propaganda about America which your petitioner found almost daily in one organ or another of the official Soviet press. As a result of Hitler's invasion of Russia the Bolshevik government is at present our "democratic" ally, but it is not only in allied countries that your petitioner has had experiences such as those just mentioned. In the summer of 1938 your petitioner went to a Japanese physician in Tokyo to take a cholera serum. The physician refused to accept any payment either for the serum or for his services, stating that his family had received assistance through American relief agencies after the earthquake of 1923.

One of the practical applications of the Golden Rule is to appeal to the better nature of people even if it is not at first apparent that they have any better nature. In the fifteenth century Lorenzo the Magnificent, at the risk

of his own life, saved his country from the ravages of war by delivering himself into the hands of his worst enemy, Ferrante of Naples, the most cruel and cynical despot in Italy. The magnificent gesture of Lorenzo so moved the heart of the cruel Ferrante that he made a reasonable peace. Even people so misguided as to uphold the doctrines of the Ku Klux Klan or of facism may be capable of better things. For example we find in the November 2 issue of *Look* the story of a French officer, sought by the police in Madrid, who in desperation threw himself on the mercy of a notorious pro-Fascist also reputed to be a Christian. It was Christmas eve, the officer related:

> "I walked to his home and threw myself on his mercy in the name of Christ. The Spaniard gave me a long look, but invited me in, fed me and gave me a bed. It was a cheap act of mercy if he were to turn me over to the police later, but I was too exhausted to care. I lay down and did not awaken until the bells were ringing for midnight mass . . .
>
> "Just outside my door, as I awoke, a Spanish policeman was talking to my host: 'But senor,' said the rasping voice which sent shivers down my spine, 'we were told the stranger entered your house this evening. He is a Frenchman—and he is wanted by the German authorities.'
>
> "I held my breath while waiting for the answer. It came after a long pause during which the Christmas bells pealed out in redoubled force, filling the air with their music. My host, the wealthy Spaniard then spoke: 'I am sorry, senor policeman,' he said, speaking slowly and softly, 'but you are mistaken.' His tone was final. I heard him walk out of the house with the policeman. Both of them were going to attend Christmas mass . . .

Such incidents are not confined to Christmas Eves in Spain, they may occur anywhere. Even soldiers on the battlefield are capable of similar generosity and honor to the men whom their respective governments have or-

dered them to kill. On August 15, 1943, the Kansas City Star published the following despatch from Harold V. Boyle, Associated Press correspondent in the Italian theatre of war:

> Sergt. Earl Wills of Cohoes, N. Y., a member of the medical corps, opened the door of a gray Italian villa two miles behind the German lines and there inside were seventeen American parachutists and two German soldiers drinking wine and eating chow together, served them by an Italian civilian.
>
> All the parachutists and the Nazis were armed, but they were laughing and having a good time. Nobody was shooting at anybody. Sergeant Wills stared in utter disbelief. He had never seen anything like that before in four years in the army.
>
> "It happened a few days after we landed," he recalled.
>
> "A paratroop officer, Lieut. Fred Thomas, came to our aid station and asked if we could come with him to treat two wounded Americans and a wounded German."

Wills and the lieutenant piled into two jeeps with three other medics - John Packard of Highland Fall, N. Y.; William Larson of Story City, Ia. and Robert Holden of Rochester, N. Y. With their Red Cross flags flying, they drove through the lines without trouble and turned in at the villa.

"I didn't say anything then, but I couldn't understand why there was no hostile air," said Wills.

"There were plenty of tommy guns and pistols around, but nobody seemed interested in using them. The Germans and parachutists were close to each other and passing the wine. They even took turns riding horses around the courtyard.

"But medics see a lot of strange things, so we didn't say anything. We patched up the wounded. All were litter cases. One of the American soldiers had a shattered arm. Another had been shot in the body. One German had shrapnel wounds in his arms, legs and hips." When the medic started to lead the wounded men into the jeeps to be taken to an Ameri-

can hospital the two Germans came over and wept as they bade goodby to their comrades. "I told them I'd be glad to take them along too if they cared to come" said Wills dryly, "but they told me they couldn't."

"As we started to leave, Thomas told us, 'You know you're in hot water?' I asked him what he meant and he said there were two German Tiger tanks outside in an orchard with their guns trained on the villa. 'I have to get their okay before you can leave,' he said. He came back a few minutes later and said it was all right for us to go and that if any enemy stopped us we were to give them the password 'Germo-Lisso' and that they would let us through. I couldn't stand all this mystery any longer and asked 'Lieutenant, what does all this mean?' "

Then the lieutenant told the sergeant one of the strangest stories of the war. He said that after being dropped far off their objective on the eve of the invasion, he and seventeen other parachutists had fought and marched their way through fifty miles of enemy territory only to be caught and captured two miles short of their own lines by the Nazi crews of the two tanks hidden in the orchard.

The tanks, part of a rearguard force had been disabled in battle but their cannons and machine guns still functioned. Against the threat of this firepower the parachutists had to yield or be slaughtered. Then the Germans proposed a weird bargain, a "gentleman's agreement." They had with them two wounded American soldiers and their own wounded friend who apparently was highly popular with the German tank men. Their own medical unit had retreated with the main body of German troops. They offered to let the parachutists go if the latter would take the wounded German to an American first-aid station. A condition was that the parachutists make no immediate attempt to counter-capture the two Nazi crews who wanted to blow up their disabled tanks before retreating and who would be at a disadvantage with their weapons thus destroyed. It was emphasized that the truce was only temporary and that the next time they met they would try to kill each other. Since the offer was obviously to their advantage, the

parachutists readily agreed and the rest were held as hostages while the lieutenant went to fetch the American medics. The agreement went through without a hitch. The Americans took off in one direction and the Nazis, after destroying their tanks, fled another way.

"We took it slowly going down the road for the first mile during which we passed about eighteen German bodies," said Wills. "Then we really let those jeeps roll and nobody tried to stop us. Next day we went back and sure enough there were the two blown-up tanks." The sergeant and other medics told Capt. John Lauten of Glendale, California, who at first didn't believe the story.

"But I set out to investigate it," he said, "and it turned out to be absolutely true. I found the two tanks with their turrets and guns blown up and I talked with the parachutist lieutenant, who corroborated the story. I know the story sounds crazy, but crazy things happen in war."

Your petitioner would say that far from sounding crazy the story sounds sane, and that it just goes to show that sane things happen even in an insane war.

In his dealings with the Indians, William Penn followed the Golden Rule. The animosity of the Indians had been aroused by the conduct of previous white settlers in Pennsylvania and as a result a few of the first Quaker settlements were raided. But Penn sent out no punitive expeditions to avenge the murder of the settlers. Instead the Quakers seized upon every opportunity to aid the Indians, provided them with food and clothing when they were in need, and cared for them when they were sick. The raids ceased and the Indians came to look upon the Quakers as friends, even trusting them as Indian representatives in dealings with white men who were not Quakers. It may be that the Quakers originally followed this policy not so much because they were convinced that it would be practical here on this earth as because their

religion required them to follow such a policy, regardless of the earthly results. However the Bible records at least one instance in which a policy similar to that of William Penn was adopted precisely because it appeared to be the only practical means whereby a massacre might be averted. Jacob, who had grievously wronged his brother Esau, learned that the latter was advancing on him with four hundred men. First he prayed, "Deliver me I pray thee, from the hand of my brother, from the hand of Esau; for I fear him lest he come and smite me, and the mother with the children" (Genesis 32:11). Then he "took of that which came to his hand a present for Esau his brother" (Genesis 32:13), several hundred head of livestock and divided them into droves with servants at the head of each drove.

17. And he commanded the foremost, saying, When Esau my brother meeteth thee and asketh thee, saying, whose art thou? and whither goest thou? and whose are these before thee?

18. Then thou shalt say, They be thy servant Jacob's; it is a present sent unto my lord Esau; and, behold, also he is behind us.

19. And so commanded he the second and the third, and all that followed the droves, saying, On this manner shall ye speak unto Esau, when ye find him.
20. And say ye moreover, Behold thy servant Jacob is behind us. For he said, I will appease him with the present that goeth before me and afterward I will see his face, peradventure he will accept of me (Genesis 32).

1. And Jacob lifted up his eyes, and looked, and behold Esau came, and with him four hundred men. And he divided the children unto Leah and unto Rachel, and unto the two handmaids.

2. And he put the handmaids and their children foremost, and Leah and her children after, and Rachel and Joseph hindermost.

3. And he passed over before them, and bowed to the ground seven times until he came near to his brother.

4. And Esau ran to meet him and embraced him: and they wept . . . .

8. And he said, what meanest thou by all this drove which I met?
And he said, These are to find grace in the sight of my lord.

9. And Esau said, I have enough my brother; keep that thou hast unto thyself (Genesis 33).

Now it might be said that this is "appeasement," and that it has been tried and found wanting against our present enemies. To such a reply the comment of a Chinese philosopher who lived more than two thousand years ago would in your petitioner's opinion, be appropriate. Mencius said:

> Benevolence subdues its opposite just as water subdues fire. Those, however who nowadays practice benevolence do it as if with one cup of water they could save a whole wagon load of fuel which was on fire, and when the flames were not extinguished, were to say that water cannot subdue fire. This conduct, moreover, greatly encourages those who are not benevolent (Mencius, Book 6).

By this quotation it is the intent of your petitioner to suggest that appeasement has never really been tried. In his opinion, if a fraction of the effort now being used to harm the people of the countries with which we are at war, if a fraction of this effort had been used to benefit the peoples of these countries, there would have been no war, no Hitlers and no occasion for a large standing army. Our country would be respected for its goodness rather than for its might. But in your petitioner's view, it will take an army to maintain the "victory" which we now appear to be winning with an army, unless the allied gov-

ernments adopt saner plans than are now in evidence. As Mencius said:

> When one by force subdues men, they do not submit to him in heart. They submit because their strength is not adequate to resist. When one subdues men by virtue, in their heart's core they are pleased and sincerely submit . . . (Mencius, Book 2).

Our government cannot consistently maintain that the Golden Rule will not work against our enemies, because it is following that rule in the treatment of prisoners of war. "Do unto the prisoners of war from Axis countries as you would have them do unto the Americans who are their prisoners" is the rule which our government follows. Moreover if we may judge by official Red Cross and State Department reports this policy has, by and large, proven very practical in securing more considerate treatment for American prisoners of the Axis powers. What your petitioner cannot understand is why this policy should not be extended to the whole field of our relations with all the countries of the world. Food would be a logical item with which to start. Our granaries are filled to overflowing and people are starving in other countries. There is no reason why our surplus food should not be sent to them. If we can also get some of it to the Germans and the Japanese and let them know who sent it so much the better. Whatever their governments might feel, many individuals would feel themselves under obligation to us for this kindness and would find it difficult to reconcile this feeling of obligation with military hostilities against us. Nothing could be better calculated to do away with their animosities. And if the enemy governments noticed that our action was thus undermining fighting morale they would scarcely dare to stop it, for that would put themselves in the position of denying things to their own people, a position quite incompatible with their claims to be working for the best interests of their people.

At the same time—admitting that the short-sighted economic warfare in which American capitalism has been one of the chief aggressors (high tariffs, dollar diplomacy and the like) has played an important part in bringing about the present armed conflict—we should persuade ourselves, and point out to our fellow human beings in other countries, that it would be to their interest, as well as to our own, to renounce this unnecessary fratricidal struggle among ourselves and unite against the ever-present common enemies of all mankind—want, disease, and ignorance. Instead of demanding that our opponent submit to us in humiliating "unconditional surrender" we should point out how it would be to our mutual benefit for both sides to submit to certain common principles (We might propose, for example: the association of power over people with responsibility for their welfare; the abolition of all tariff duties, the adoption of a common monetary system, and the creation of a gigantic public corporation to handle international commerce at cost, without discrimination between nations.) Nor should this be just a trick by which to deceive the opposing governments into surrendering to our armed forces. This policy should be continued when peace had been restored. With the enlightened selfishness of cooperation in all good causes we should put greedy, short-sighted imperialists to shame and consistently practice ourselves what we have been preaching for others.

In your petitioner's opinion if we took a determined initiative in applying the policies indicated by the Golden Rule and devoted as much energy and ingenuity to the pursuit of these policies as we are now devoting to the war effort, we could convert this contest among the nations from a contest in doing harm to one another to a contest in doing good for one another. Possibly even a man like Hitler could by such methods be converted from a Saul into a Paul. He might not want to be outdone by Churchill, even in a contest of generosity!

When a spirit of mutual trust, good will, and understanding had been built up by methods of this kind, it should not be difficult to merge our national sovereignties into one great country, the United States of the World. In such a country, causes of future strife could be greatly reduced by the conversion of the largest private corporations into public corporations similar to the T. V. A., corporations owned by humanity and operated, not for private profit, but for the benefit of humanity.

(5) Unlike some conscientious objectors your petitioner refuses to accept any kind of non-combatant service in the army. It has been suggested to him that he might make things much easier for himself now and in the future and at the same time do "humanitarian" work by going into the army medical corps. Your petitioner's view on this point was well expressed by a wounded soldier whom Mrs. Roosevelt interviewed in the Pacific war zone. According to the president's wife (for whose consistent efforts to understand, and fairly to present, the points of view of others your petitioner has considerable respect), the wounded soldier said of the treatment he and his wounded comrades were receiving:

> "The government does this for us so's we'll be able to go out and die. But they never did it for us so we could live" (Kansas City Times, November 13, 1943).

Viewed by itself the work of the army medical corps appears to be humanitarian, but if it cures a man of his sickness or injuries, the man is again seized by the combatant branch of the army and sent out to kill others and perhaps himself to suffer graver wounds than he had before, or death. That is why your petitioner refuses to accept service even in the "humanitarian" medical corps of the army.

These paragraphs may clarify somewhat the position of your petitioner with regard to war and conscription. No matter what the penalty for refusing to serve in the Army, your petitioner will never serve in it. However, as he indicated at the hearing (R. 37) he is strongly desirous of serving humanity in general, and his country in particular, in a manner consistent with his convictions, and he hopes that, in prison if not outside, the Government will find it possible to put to some use his rather good education and his knowledge of foreign languages.

It is of course for the court to decide whether or not to consider petitioner's objection to war and conscription as an additional legal ground for granting this petition. For his own part, your petitioner remains convinced that the legal grounds presented at the initiation of the habeas corpus proceeding are more than sufficient to warrant his release from the hands of the military authorities to the hands of the civil authorities.

COMMENT WITH REGARD TO THE FINDINGS OF LAW IN THE MEMORANDUM OPINION OF THE DISTRICT COURT.

It is stated in the Memorandum Opinion of the District Judge (R. 43) that "Rules and regulations now in effect and in effect at the time the petitioner presented himself at the Leavenworth induction center carry no provision for the giving of an oath." In support of this contention Judge Hopkins points out that paragraph 429 of the original Selective Service Regulations contains two sentences which do not appear in the corresponding paragraph (633.0) of the revised regulations. However he evidently overlooks the fact that MR 1-7, paragraph 13e overlapped paragraph 429 of the original Selective Service Regulations, and that while the amendment of the latter did away with the overlapping, it did not do away with the

provision for the administration of an oath which remained in MR 1-7, paragraph 13e. Hence the statement that the rules and regulations in effect at the time that the petitioner presented himself at the Leavenworth induction center "carry no provision for the administration of an oath" does not correspond with the facts. In view of the fact that the provision for the administration of the oath remained in MR 1-7, paragraph 13e it is not necessary to answer the assertion that the amendment of the Selective Service Regulation to eliminate provision for the administration of an oath was "undoubtedly" made "to avoid question being raised and to avoid waste of army time and effort in resisting such unprovident proceedings as the one here" (R. 45). The regulation might have been amended simply because the part omitted overlapped the provisions of another regulation (MR 1-7, par. 13e).

The conclusion of the Judge of the District Court that "The giving of an oath and admonition that you are now in the army, constitute mere formality" (R. 45) is apparently also based on the erroneous assumption that there was no longer any regulation requiring the administration of an oath.

It is further stated in the Memorandum Opinion that "The whole statutory procedure outlined in the Act and the regulations thereunder, culminating in petitioner's examination and notice of acceptance operated as induction" (R. 45). In coming to this conclusion the Judge of the District Court apparently overlooked not only the previously noted provisions of MR 1-7, paragraph 13e, but also a provision appearing in section 3 (a) of the Selective Service Act itself. This provision is:

> That no man shall be inducted for training and service under this Act unless and until he is acceptable to the land or naval forces for such training and service and his physical and mental fitness for such training and service has been satisfactorily determined.

From this it is quite clear that the physical examination comes before and is not a part of induction.

If any further evidence on this point were needed, it could be found in the language of paragraph 633.9 of the Selective Service Regulations which the court itself cites as one of the pertinent regulations. This paragraph reads as follows:

> At the induction center, the selected men *found* acceptable *will be* inducted into the land or naval forces.

From this also it is evident that a person cannot be inducted until after he has been examined and found to be acceptable.

Because of the statutory provisions noted above, the evidence to the effect that before his physical examination petitioner slept in Army barracks and ate in an Army mess hall is completely irrelevant to the case. So did all those not found acceptable.

It is even contended by the District Court (R. 45) that petitioner has "in fact fully complied with the terms of the Selective Training and Service Act," that "there may be some question as to whether he has committed an act for which he might be prosecuted in the civil courts" and that "an order from this court releasing him from the military authority might have the anomalous result that petitioner would walk away scot free of both the military and the civil authorities." In view of the fact that the petitioner freely admits that he has violated the most important provision of the Selective Service Act it is difficult to see upon what such a contention is based. One law requires that petitioner serve in the Army, another requires that he pay a tax; refusal to serve in the Army is surely as obvious a violation of the former as refusal to pay a tax is of the latter. The situation may be illustrated by an anology. Suppose the law required petitioner to walk to the cliff of induction and to jump over it into service in the Army. If petitioner refused to take the first step, registration, he could clearly be pros-

ecuted in the civil (R. 24) courts for refusing to do so. If he refused to take the second step toward the cliff of induction, filling out the questionnaire, he could be prosecuted in the civil courts for refusing to do so. But, according to the Judge of the District Court, if he refused to take the crucial step over the cliff of induction there may be some question as to whether he has committed an act for which he might be prosecuted in the civil courts. So, to continue the analogy, the honorable Judge proposes to let the military authorities reach up and drag the petitioner over the cliff of induction into the valley of involuntary military servitude and there to court martial the petitioner, not for refusing to jump over the cliff of induction, but for refusing to obey a military order to take the first step of fingerprinting in the valley of involuntary military servitude.

The remaining contentions of the District Court are sufficiently answered elsewhere in this brief.

An answer to the written opinion of the Circuit Court of Appeals accompanied the petition for a writ of certiorari.

REPLY TO THE ARGUMENT OF THE BRIEF FOR THE RESPONDENT IN OPPOSITION (ON PETITION FOR WRIT OF CERTIORARI).

The respondent's side of the argument opens with the following statement:

> In substance petitioner's argument that he was not legally inducted into the Army is based upon the proposition that the obligation imposed by the Selective Training and Service Act is not specifically enforceable and that punishment for civil disobedience is the extreme sanction whereby, under the Constitution, the United States may exercise its power to raise armies and resist aggression. As a constitutional proposition it is self-refuting (p. 6).

To this it should be a sufficient answer that, in their treatment of the men who balk a step or two farther from the cliff of induction than did your petitioner, the responsible authorities themselves appear tacitly to accept the allegedly "self-refuting" proposition attributed to your petitioner. For those who refuse to register for the draft, for those who refuse to fill out the questionnaires, and for those who refuse to report for the medical examinations—the legal obligation (to serve in the Army) imposed by the Selective Training and Service Act is *not* specifically enforced, and punishment for civil disobedience *is* the extreme sanction by which the United States exercises its power to raise armies.

If any proposition upon which the substance (or any part) of your petitioner's argument may be based is, as the respondent contends "self-refuting"—it certainly is not self-evident that this is the case, and in the absence of proof the respondent's contention to this effect cannot be sustained. But no proof is presented by the respondent either in the text of his brief or in his citation from the Selective Draft Law Cases. In this citation all that is said

to be "refuted by its mere statement" is what would appear to be the court's own mockery of a contention that the whole World War draft law was unconstitutional because it imposed involuntary servitude.*

At this point it might again be noted that the question of whether a man drafted into the Bolshevik, American, or Nazi armies is in voluntary service or involuntary servitude is not a question of law which may be decided by the courts once and for all, but a question of fact which (as the derivations of the terms voluntary and involuntary themselves imply) cannot logically be resolved without reference to the will (volonté) of the individual involved. For one German patriot what the Nazi draft law requires might appear to be voluntary service, "the performance of his supreme and noble duty" (to use the language of a decision cited by the respondent)—but for an equally patriotic German who is convinced that war is a wrong and self-defeating means of attempting to defend the "rights and honor" of his nation, what the same German draft law requires would certainly be involuntary servitude to which he would feel it his patriotic duty to refuse to submit. An analogous proposition would hold for other countries including our own.

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*The remark of the court on which the respondent apparently relies reads as follows:

> Finally, as we are unable to conceive upon what theory the exaction by government from the citizen of his supreme and noble duty of contributing to the defense of the rights and honor of the nation, as the result of a war declared by the great representative body of the people, can be said to be the imposition of involuntary servitude in violation of the prohibitions of the Thirteenth Amendment, we are constrained to the conclusion that the contention to that effect is refuted by its mere statement (Selective Draft Law Cases, 245 U. S. 366, at p. 390).

In answer it might first be pointed out that this remark was made in connection with the draft for the first World War "to make the world safe for democracy" and that, in the light of the disillusioning developments of the past twenty-five years

The answer to the question of whether what the draft law would require of a man should be held to be voluntary service or involuntary servitude lies not in what the law would require of the individual, but in the reaction of the individual to what the law would require of him. In the present case an unequivocal answer to this question is to be found in the reaction of your petitioner to the efforts to induct him into the Army and, subsequently, to the efforts to get him to act as if he were a soldier.

Surely, in view of the language of the Thirteenth Amendment, no court could deny that a prisoner at hard labor may be presumed to be in involuntary servitude. When confronted with the limited alternative of becoming such a prisoner or of becoming a soldier, your petitioner chose involuntary servitude in prison. That fact in itself should be proof sufficient that to put petitioner into the army, even as an officer in a non-combatant unit, would be to put him into involuntary servitude to him still more reprehensible than that to which he would be subject in prison.

So much in answer to the first two sentences in the opening paragraph of the respondent's argument. The remainder of that paragraph may be more briefly answered. It reads as follows:

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there is serious question as to whether the sacrifices of the men drafted for that war did actually contribute to "the defense of the rights and honor" of this or any other nation. Some well-informed people would even go so far as to contend that as a direct result of the first World War the world was made *less* safe for democracy.

Your petitioner earnestly believes that he is at least as desirous of "contributing to the defense of the rights and honor of the nation" as is the average volunteer soldier, but in distinction from the latter your petitioner is convinced that war is a wrong and self-defeating means of making such a contribution, and that the most efficient, and the only right, means of making a lasting contribution to the defense of the rights and honor of the nation are means consistent with the Golden Rule.

> The express power to levy war may not be thus legally nullified by a citizen's or a citizenry's choice of prison in preference to war. It contemplates more effective service than the suffering of civil punishment (p. 6).

Now if the express power to wage war would to any extent be legally nullified by a citizen's choice of civil prison in preference to war, it would to an equal extent be legally nullified by the citizen's choice of military prison (or death)* in preference to war—so the respondent's contention on this point is irrelevant to the question of whether your petitioner should be subject to civil or to military punishment.

The citizenry of this country, by their absolute refusal to wage war, could surely nullify, legally and in fact, the most specific power of the Government to wage war, and it is surprising that the contrary should be contended, for such a contention would imply not only that the Government had the right to wage war in flagrant defiance of the will of the people, but that it had the might to do the im-

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Finally, the mere fact that the members of "the great representative body of the people" have declared a war and, specifically exempting themselves, have drafted others to fight it, is no proof that the draft does not involve involuntary servitude for anyone. On many an occasion in its history Congress has unfortunately shown itself quite capable of giving its blessing, at least locally, to the institution of slavery (*e. g.* when it approved constitutions permitting slavery for Louisiana, Mississippi, Alabama, etc.).

If this is not a sufficient answer to the opinion cited, then perhaps the remarks of Daniel Webster quoted in the appendix will be.

*Although according to Article of War 64, the penalty for refusing to obey a direct order is "death or such other punishment as a courtmartial may direct" the Army authorities at Ft. Leavenworth in practice have probably been less severe in their punishment of conscientious objectors than has been the Kansas District Court. Most of the Army officers with whom your petitioner has come in contact (and this definitely includes the respondent) have shown far more consideration for your petitioner as an individual, and a much better understanding of his opposition to war, than was shown by the Judge of the District Court.

possible—to wage a war through the instrumentality of a citizenry that absolutely refused to wage war. If the citizenry of the most tyrannically governed country on the face of the earth absolutely refused to wage war, the dictatorial government could not wage war. It could issue a decree to the effect that all citizens had "by operation of law" (R. 45) become members of the armed forces and, when they continued to refuse to wage war, it might sentence them to military prison or to death, but still the citizenry would have nullified the dictatorial government's power to wage war.

Further proof of the untenability of the respondent's contention on this point is to be found in the fact that during the War of 1812 the New England States, by refusing to respond to the federal government's call for militia, to a considerable extent did nullify the specific power of Congress:

> To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions (Article 1, Section 8, par 15 of the Constitution of the United States).

As to what was contemplated by the Constitutionally conferred war powers, the respondent's contention, even if sustainable, would be irrelevant to the issue of whether your petitioner should be subject to civil punishment or to millitary punishment for his refusal to submit to induction into, or service in, the army. The imposition of military punishment does not constitute the exaction of "more effective service than the suffering of civil punishment." The officers in charge of the guardhouse in which your petitioner is confined, pointing out that soldiers who might be used for other purposes are required to guard those confined, have repeatedly told the prisoners there that as prisoners they are a hindrance rather than a help to the war effort. Teaching economics at the University of Texas, your petitioner was, in his opinion, rendering

much more effective service to his country than he is likely to be allowed to render in any prison, civil or military (or in any concentration camp for conscientious objectors).

So the respondent's contention as to what the constitutionally conferred war power contemplates would not be relevant even if it could be sustained. Nor can the respondent's contention be sustained. There is historical reason to doubt that the framers of the Constitution ever contemplated conferring upon the federal government any power of conscription at all, let alone a power so absolute as that for which the respondent contends. The only conscription bills introduced in Congress during the lifetime of any of the members of the Constitutional Convention were rejected by Congress, although the very existence of the country appeared to be threatened at the time when these bills came up for consideration (This was in the War of 1812 during which the British captured Washington and set fire to its public buildings, invaded Maine, etc.). In the debate which preceded the defeat of Monroe's conscription bill Daniel Webster on December 9, 1814, eloquently branded conscription as unconstitutional in principle. Answering the contention of the Secretary of War that conscription was implicitly authorized under the Constitutional power to raise armies, Mr. Webster said:

> . . . The Constitution is libeled, foully libeled. The people of this country have not established for themselves such a fabric of despotism. They have not purchased at a vast expense of their own treasure and their own blood a Magna Charta to be slaves. Where is it written in the Constitution, in what article or section is it contained, that you may take children from their parents and parents from their children, and compel them to fight the battles of any war in which the folly or the wickedness of government may engage it? Under what concealment has this power remained hidden which now for the first time comes forth, with a tremendous and baleful aspect, to trample down and destroy the dearest rights of personal liberty . . .

> An attempt to maintain this doctrine upon the provisions of the Constitution is an exercise of perverse ingenuity to extract slavery from the substance of a free government . . . (further excerpts from Webster's speech appear in the Appendix to this brief).

This should, in petitioner's opinion be a sufficient rebuttal to the contentions in the first paragraph of the respondent's argument. The second paragraph of his argument may now be considered. It opens with the following sentence (p. 6):

> Petitioner's position is no stronger under the provisions of the Selective Training and Service Act and the regulations issued thereunder.

In fact, although it apparently need be no stronger in order to withstand the previously considered contentions of the respondent, your petitioner's position is specifically reinforced by the previously cited provisions of:

> Section 11 of the Selective Training and Service Act, Mobilization Regulation 1-7, Paragraph 13e, Article of War 109, etc.

It is no answer to these specific provisions to state, as the legal representatives of the respondent do next (p. 7) that the draft Act "speaks in terms of compulsory military service." Military service is for your petitioner just as compulsory as, BUT NOT MORE SO than for the other selectees who are regularly tried in CIVIL courts for "refusal to report for induction." With regard to these other selectees the authorities do not attempt specifically to enforce service in the Army; neither do the authorities go out and capture these selectees, drag them to an induction center, and then claim that reporting for induction "occurs by operation of law" and that "it is something over which the party affected has no control" (R. 45).

It is also compulsory that drivers stop their vehicles upon coming to a red light, but that does not mean that every driver will inevitably stop his car at each red light.

The compulsion consists in the threat that, if he does not stop his car, he may be subject to say five days in jail or a ten dollar fine or both. This compulsion is sufficient to bring about specific compliance with the terms of the traffic law in most cases. The compulsion in the case of the Selective Training and Service Act consists in the threat (Section 11) that—if one "knowingly fails" to do anything prescribed by the Act or regulations or "otherwise evades registration or service in the land or naval forces or any of the requirements of this Act" he may be subject to five years in prison or a ten thousand dollar fine or both (or if subject to military law, to such punishment as a courtmartial may direct—but with the specific proviso that no one shall be subject to trial by courtmartial unless such person shall have been "actually inducted" for the training and service prescribed). This compulsion is sufficient to bring about specific compliance with the terms of the Act in most cases. Most men who would not voluntarily have served in the Army are intimidated into taking all the steps that lead up to and over the cliff of induction: registration, filling out and returning of questionnaires, reporting for and submitting to physical examination by the Army medical authorities, and reporting for and submitting to induction into the Army. The last step is no more compulsory than the first or the next to the last, and there is no more reason for trying by courtmartial a man who refuses to take the crucial step over the cliff of induction than there is for trying by courtmartial a man who refuses to take any of the preceding steps.

The next contention of the respondent's argument deserves particular attention because, while at first glance it appears to be both correct and relevant to this case, the appearance turns out to be most deceiving. The contention reads as follows (p. 7):

> In providing that no man, without his consent, shall be inducted for training and service under this Act

> after he has attained the forty-fifth anniversary of the day of his birth, Section 3(a) clearly presupposes that actual induction may proceed without the selectee's own consent in other cases.

Since all those soldiers who would not have consented to go into the Army in the absence of compulsion, but who *have consented under compulsion to go into the Army*, have obviously been *inducted without their freely given consent*—it follows that *the above cited provision* of Section 3 (a) *would presuppose something relevant to the case of your petitioner*, who has refused even under compulsion to go into the Army, *only if the word "consent"* as used in the provision *included the kind of consent which might under compulsion be given (or refused)* by a man over forty-five. But *"consent" as used in the provision cited* means freely given consent and *excludes the kind of consent which might be given under compulsion.* This can be easily demonstrated. Do the Army authorities maintain that they can induct a man over forty-five years of age who would not consent to induction in the absence of compulsion, but who will consent to induction under compulsion (the threat that, if he doesn't consent, he may be sentenced to five years in prison and a ten thousand dollar fine)? Of course the Army authorities do not maintain this. It follows that in fact the provision cited in the respondent's argument clearly presupposes only that men under forty-five may be inducted without their *freely given consent.* Nobody denies that! Your petitioner is of the opinion that the great majority of the soldiers in the Army have been inducted without their freely given consent even though they have all given their consent under compulsion. So the contention in the respondent's argument as to what the provision cited "clearly presupposes" turns out to be neither relevant to the case at hand, nor correct in the sense in which it was meant.

The next sentence in the respondent's argument reads as follows (p. 8):

It is his proving acceptable to the land forces that constitutes the basis of, and last condition precedent to, induction.

Your petitioner is not quite sure what was meant by this sentence. If it was meant as a reaffirmation of the contention that Section 3(a) "clearly presupposes that actual induction may proceed without the selectee's own consent," provided that he is under forty-five years of age—it is just as irrelevant to the case at hand, and just as incorrect in the sense meant, as it was when stated the first time. If, and insofar as, what was meant by the sentence in question was only that being physically examined and found acceptable constituted a "condition precedent" to, and hence not a part of, induction—your petitioner would agree. [In his brief to the Circuit Court of Appeals your petitioner endeavored to demonstrate this very point to prove that the District Court, overlooking the provisions of Section 3(a) had erred in holding (R. 45) that "the whole statutory procedure outlined in the Act and the Regulations thereunder culminating in petitioner's examination and notice of acceptance operated as Induction."] However, proving acceptable to the land forces constitutes the "last" condition precedent to induction only in a sense similar to that in which obtaining a marriage license (which indicates that the proposed marriage is acceptable to the government) constitutes the "last" condition precedent to marriage. The marriage ceremony cannot begin until the marriage license has been obtained and the induction ceremony cannot begin until the selectee has been found acceptable. But even though the marriage license has been obtained, a couple cannot be inducted into holy matrimony if either of the parties does not report for the marriage, or, upon coming to the church for some other purpose, refuses to take the marriage vow and to assume the obligations of marriage. Similarly, in your petitioner's opinion, a man cannot be inducted into the Army if he does not report for induction, and, upon coming to the induction building for the purpose

of making an inquiry, refuses to be inducted, refuses to take the oath of induction. There is however a distinction in the effect of refusal in this case. If a man refuses to take the marriage vow, the courts may make him pay damages for breach of promise; but, if a selectee refuses to submit to induction, the courts may and should under the terms of the law make him pay a fine, or sentence him to prison, or both.

The remainder of the paragraph (of the respondent's argument) under discussion establishes the fact that it was not for the selectee's benefit that two of the provisions of Section 3(a) prohibit the induction of alien enemies and selectees in general, respectively, unless and until they have been found acceptable to the land or naval forces (pp. 7-8). Your petitioner has never contended the contrary.' [All that your petitioner has contended with regard to either of these provisions is that, under the latter of the two, taking the physical examination and being found acceptable constituted a condition precedent to, and not a part of, induction. The respondent's present legal representatives apparently agree (pp. 7-8) that this is the case.]

But in the next paragraph the respondent's argument jumps from the above-mentioned incontestable fact, as a premise, to a conclusion which does not follow from it at all. This paragraph being as follows (p. 8):

> Proving "acceptable to the land or naval forces" is no more for the citizen selectee's benefit than for the alien's, and an unequivocal indication by the military authorities, after examination of their acceptance, is in either case tantamount to induction.

The conclusion is a logical *non sequitur* from the premise stated, and, even taken by itself, is not correct if the selectee has flatly refused to "take" the oath of induction as prescribed in Article of War 109, the terms of which are explicitly invoked by Mobilization Regulation 1-7, paragraph 13e.

An unequivocal indication by the military authorities of their acceptance of a man into the Army at the conclusion of an induction ceremony, which is to be distinguished from the acceptance of a selectee for training and service at the conclusion of the physical examination (to which the respondent apparently refers) is comparable to the solemn statement "I now pronounce you man and wife" which concludes a wedding ceremony. This pronouncement would obviously be without legal effect if either of the parties had flatly refused to go through with the marriage. Similarly your petitioner earnestly contends that, as applied to himself, the assertion "That doesn't make any difference, you are in the Army now," coming as it did after petitioner's flat refusal to be inducted into the Army and to take the oath of induction (R. 22) was without legal effect.

It is further contended in the respondent's argument (p. 8) that

> The Selective Service Regulations use the word "induction" as the antithesis of "rejection"—in other words as meaning simply "acceptance" by the land or naval forces.

Judging only from the provisions cited in the respondent's brief, this contention might possibly appear to be correct. However it is not, and this is easy to establish: Except where a selectee has obtained special permission to take the final physical examination (by the Army medical authorities) in advance of the date scheduled for his induction, the Selective Service System now sends him a combined order to report for the final physical examination and, if accepted, to report for induction. This official Selective Service order, bearing the short title "Order to Report for Induction" (DSS Form 150, revised January 15, 1943), contains the following sentence:

> You will there be examined, and, if accepted for training and service you will *then* be inducted into the land or naval forces.

From this sentence it should be clear that "acceptance" for training and service does not mean "induction." If one may judge from the sentence above quoted, acceptance for training and service by the land or naval forces comes before, and is not a part of induction.

The respondent's contention as to the meaning of the word "induction" is also refuted by the official definition of that word given in the Federal Register (Volume 5, No. 187, page 3780, paragraph 102). The official definition reads as follows:

> Induction is the process by which the men selected for military service *pass* from the status of civilians to the status of members of the land and naval forces of the United States.

It will be noted that, according to this official definition the men selected "pass" (active voice), not "are passed" (passive voice), from the status of civilians to the status of soldiers. The use of the active voice clearly indicates that it is the men themselves who take the step from civil to military jurisdiction, albeit under compulsion (the threat that if they do not take it they may be subject to five years in prison or a ten thousand dollar fine or both). It is implied by the official definition that the step is not taken for them "by operation of law" (R. 45). The very etymological derivation of the word "induction" refutes the respondent's contention to the effect that induction is a process purely passive so far as the person inducted is concerned, a process to the completion of which his cooperation is quite unnecessary. The word induction means literally the process of leading (into). A person may be dragged into something without taking any steps, but he cannot be said to have been led (inducted) unless he has taken steps himself. Induction differs from what the Army has tried to do to your petitioner in the same way that seduction differs from rape.

The District Court decision in the case of *United States ex rel. Diamond* v. *Smith* is the only decision presented by the respondent in direct support of his contention that your petitioner was lawfully "inducted" (In this decision, *interestingly* enough, the District Court opinion in your petitioner's own case was the only one presented in direct support of the finding that Diamond had been lawfully inducted). The ruling in this decision as to when induction takes place reads as follows (47 F. Supp. 609):

> . . . Thus if this regulation has the force of law—it seems that if a man successfully passes the physical examination and is accepted by the army for training and service, he is inducted into the army whether he takes the oath administered to him or not . . . When a draftee is accepted by the Army for service and training, all the requirements of the Act and regulations have been satisfied. The completion of the steps outlined in the Act and regulations operates as induction.

This obviously amounts to asserting that when a draftee is "accepted by the Army for training and service" his induction is completed. As has been previously noted, a contention to this effect is refuted by the explicit statement or command to the selectee, in an official Selective Service order (DSS Form 150), that "if accepted for training and service you will *then* be inducted into the land or naval forces" from which it follows that acceptance for training and service is a condition precedent to, but not a part of, induction. It might also be noted that in the above cited decision the use of the word "administered" to apply to a case where the oath was not taken, is incorrect. This may be demonstrated by example: Suppose that a surgeon were to ask a nurse whether or not she had administered an anaesthetic to a patient, and that in fact the nurse had poured chloroform on a mask and had put the mask over the patient's nose and mouth, but that the patient had knocked the mask off and had refused to take

the anaesthetic. Now we may ask ourselves whether or not the nurse could correctly answer the surgeon's question in the affirmative. Obviously she could not. What *she might correctly answer* would be "No, I tried to administer it to him, but he refused to take it." Or suppose that a judge should ask the bailiff whether or not he had administered the oath to a witness, and that in fact the bailiff had read the oath to the witness who had flatly refused to take it. Now let us ask ourselves whether or not it would be correct for the bailiff to answer the judge's question in the affirmative. Obviously it would not. The correct answer would be "No, I read it to him, but he refused to take it." Neither an anaesthetic nor an oath can be said to have been "administered" unless the anaesthetic or the oath has been taken.

The next contention in the argument of the brief for the respondent (p. 9) is that

> A proposition that subscription to an oath or affirmation is a condition precedent to completion of a procedure that by hypothesis is compulsory throughout is self-contractory.

Here again is a contention in which the respondent's legal representatives mistake the word "compulsory" for the word "inevitable." The logical fallacy of the respondent's contention that the proposition stated is "self-contradictory" may be exposed by reference to the example of a logically identical proposition: Suppose a traffic law having the following provisions:

> It shall be compulsory for drivers of vehicles, upon approaching a red light, to slow down their vehicles, and just before reaching the red light, to bring their vehicles to a full halt.

The proposition is that slowing down a moving vehicle is a condition precedent to stopping it (*i. e.*, "to the completion of a procedure that by hypothesis is compulsory throughout"). Is this proposition "self-contradictory"?

Of course it is not! Neither is the proposition that taking the oath is a condition precedent to induction!

The respondent's argument continues with the statement that

> Neither the Selective Training and Service Act nor the Selective Service Regulations require that a selectee subscribe to an oath.

This is true, but taken by itself it would be misleading since the oath requirement appears in other regulations having the force of law (Mobilization Regulation 1-7, Paragraph 13e).

It is next stated in the respondent's argument that the oath requirement of Article of War 109 "has been held applicable of its own force only to men who voluntarily enlist." However, it might be pointed out that the contrary was implicitly ruled in the case of *United States* v. *Prieth et al.* (2 Cir., 251 Fed. 946, 954), where it was held that "enlistment" as used in the Articles of War applied both to volunteers and to draftees.

Anyway it is not essential to your petitioner's argument that this Article of War be applicable "of its own force" to selectees, since the terms of this Article are explicitly invoked by Mobilization Regulation 1-7, Paragraph 13e (1), which regulation definitely does apply to selectees.

The respondent further contends that the oath requirement of Article of War 109 "by its terms presupposes that the taker is already a soldier." This contention, conflicting with the Supreme Court ruling in the Case of *U. S.* v. *John Grimley* (137 U. S. 636), is evidently based solely upon the fact that the word "soldier" is used in the Article of War in question. This Article reads as follows:

> Art. 109. *Oath of Enlistment*—At the time of his enlistment every soldier shall take the following oath or affirmation: "I, _____, do solemnly

> swear (or affirm) that I will bear true faith and allegiance to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to the rules and Articles of War." This oath or affirmation may be taken before any officer.

The fact that the word "soldier" is used in this article is no proof of the respondent's contention. The Constitution provides that the "President" shall take an inaugural oath, but that does not mean that he is already the President before he takes the oath. The country does not have two Presidents at the same time. Before the President-to-be takes the oath he is the President-elect. As the President-elect takes the oath he becomes the President and simultaneously, his predecessor ceases to be President and becomes ex-President.

Furthermore the above mentioned Article of War is entitled, not "Post Enlistment Oath," but "Oath of Enlistment," and it is prescribed that the oath be taken not "after enlistment," but "at the time of enlistment." It will also be noted that in the latter part of the oath itself, the taker formally binds himself with the obligations of a soldier. Prior to binding himself thus it must be presumed that the taker had the rights and status of a civilian. Just as a man does not become a husband before he takes the marriage vow so a civilian does not become a soldier until he is "sworn into the army."

If any further proof of the untenability of the respondent's contention on this point were needed, it is to be found in the unequivocal language used by the Court in the case of *U. S.* v. *John Grimley* (137 U. S. 636), where it was held that

> The taking of the oath of allegiance is the pivotal fact which changes the status of the recruit from that of civilian to that of soldier.

The respondent's argument continues with the statement that

> War Department Mobilization Regulation No. 1-7, Paragraph 13e (4), expressly covers the contingency of a selectee's refusal to take the oath asked of him under this regulation.

The regulation "covers" this contingency all right, but not in the way implied by the respondent's argument. The relevant part of Mobilization Regulation 1-7, Paragraph 13e, read as follows:

> (e) *Induction Ceremony*
>
> All men successfully passing the physical examination will be immediately inducted into the Army. The induction will be performed by an officer in a short ceremony in which the men are administered the oath, Article of War 109:
>
> (4) They will be informed that they are now members of the Army of the United States and given an explanation of the obligations and privileges. In the event of refusal to take the oath (or affirmation) of allegiance by a declarant alien or citizen he will not be required to receive it but will be informed that this action does not alter in any respect his obligation to the United States.

It will be noted that section (1) of this provides that the men shall be "inducted" (*i. e.*, led, taking the steps themselves, not dragged) into the Army in a ceremony in which they are administered (not just read) the oath, "Article of War 109." And it will be recalled that this Article, the terms of which are specifically invoked, prescribes that every man shall "take" this oath at the time of enlistment and that according to the ruling in the case of *U. S.* v. *John Grimley* (137 U. S. 636), it is the *taking* of the oath, not the reading of it by somebody else, that changes the status of a man from that of a civilian to that of soldier.

"They" used in section (4) of the above quoted regulation, clearly refers to the men to whom the oath has been administered in accordance with the provisions of section (1) and of Article of War 109 the terms of which section (1) explicitly invokes. "They" to whom the oath has been administered in accordance with these provisions and who by "taking" the oath have, under the ruling in the Grimley case, changed from the status of civilian to that of soldier—*they* are informed that *they* are now members of the Army.

But *he* to whom (because he has refused to take it) the oath has not been administered in accordance with the provisions of section (1) of the Regulation and of Article of War 109, *he* who has refused to be led (inducted) into the Army, refused to take the step which (according to the Grimley ruling) would have made him a soldier—He is informed, not that he is now a member of the Army, but only that his refusal "does not alter in any respect his obligation to the United States." Precisely the same information could be given to a man who, having put his resources beyond the reach of the government, refused to pay his federal taxes. His refusal to pay them "does not alter in any respect his obligation to the United States" and he may therefore be tried by the civil courts and imprisoned for refusing to pay the taxes. Likewise a man who refused to stop at a stop sign might be informed that this did not alter in any respect his obligation to stop and that since it was compulsory to stop, he would be subject to a ten dollar fine, or five days in jail, or both, for refusing to do so. For like reason your petitioner, who did not report for induction and refused to be inducted (led) into the Army and to take the oath of induction, should, under the provisions of Section 11 of the Selective Training and Service Act, be tried by civil courts and imprisoned for one of these offenses.

To read into Mobilization Regulation 1-7, paragraph 3b what the respondent commends is arbitrarily to read into it something which simply is not there and which, even

if it had been there, would have been both unconstitutional and in conflict with the intent of Section 11 of the Act in pursuance of which the regulation was issued.

By way of the irrelevant or unsustainable contentions which have thus far been considered here, the respondent's argument reaches the conclusion (pp. 9 and 10) that "'all the steps prescribed by statute, and by regulations having the force of law,' having been strictly taken in the present case, petitioner therefore was legally inducted." Deprived of the support of his preceding contentions the respondent's conclusion falls of its own weight, and no further disposition of it is required. With the fall of this conclusion, its corollary (p. 10) that "petitioner is subject to military jurisdiction" also collapses and the respondent's further contention—that petitioner "is not being kept in confinement for any act committed prior to induction, but for his continuing refusal to obey a lawful military command to be fingerprinted"—is refuted (Not having been legally inducted even yet, your petitioner is being held for an act committed "prior to" induction, for his continuing refusal to obey an *unlawful* military command to be fingerprinted).

In the last paragraph of his argument respondent contends:

> "The exact moment at which, after (petitioner) reported at the induction center, restraint was first placed on his person is immaterial,"

This is as unsustainable as any of the previously considered contentions of the respondent. For at least two reasons it is important to note that, *EVEN ACCORDING TO THE RULING OF THE CIRCUIT COURT* (R. 55), *PETITIONER HAD NOT BEEN "ACTUALLY INDUCTED" AT THE TIME WHEN THE ARMY PUT HIM UNDER ARREST* [to keep him from leaving before the "induction ceremony" and from turning himself over to the civil authorities for arrest and imprisonment for re-

fusal to report for induction (R. 21)]. This fact is important first because the purpose of the legal provision prohibiting the courtmartial of a selectee who has not been "actually inducted" into the Army would obviously be defeated if the Army could arrest a selectee *whom it was specifically prohibited, at the time of the arrest, from courtmartialling,* and, by its unilateral act, against his protest, subject the selectee to a process ("induction") which would permit the Army to courtmartial him.

This fact is important, in the second place, because it clearly refutes any assertion to the effect that that petitioner "reported for induction." How, in the face of this fact respondent can maintain (p. 10) that "a sufficient answer to (petitioner's) contention that he did not report for induction is that he reported at the induction center" is more than your petitioner can see. If petitioner really had reported "for induction" at the reception center, it surely would have been quite unnecessary to put him under arrest to keep him from leaving before the scheduled induction, unnecessary to keep him from turning himself over to the civil authorities for arrest and imprisonment for refusal to report for induction.

The respondent's contention to the effect that "reporting" at the induction center (in fact solely for a physical examination) constitutes "reporting for induction" is refuted even by his own previous statement (pp. 7 and 8) to the effect that taking the physical examination and being found acceptable constituted a "condition precedent to" (hence not a part of) induction. The physical examination being a separate and distinct process from induction it is obviously possible to report for the one without reporting for the other. *It is a mere geographical accident that, in the case of soldiers, physical examination and induction both take place on the same reservation.* In the case of sailors the physical examination takes place at Ft. Leavenworth but the men are taken to Kansas City to be inducted or "sworn" into the Navy.

The absurdity of the respondent's contention that petitioner "reported for induction" just because petitioner in fact "reported at the induction center" for a physical examination may be demonstrated in still another way: Suppose that there were no draft and that, instead of an "induction center," there were an "enlistment center" on the Ft. Leavenworth military reservation. Suppose further that it was provided by Act of Congress that "the Army shall be empowered immediately to induct all persons reporting for enlistment at an enlistment center." Could the Army, under the provisions of such an Act, legally "induct" a man who "reported at the enlistment center," say for work on the telephone system, in spite of the man's denial that he had reported for enlistment and of his refusal to submit to induction? Of course not! *Reporting at an induction center does not constitute reporting for induction unless there is an intent on the part of the person reporting to report for induction.* Respondent concedes in his statement of the facts (pp. 3 and 4) that petitioner had no such intent.

It might here be noted again that on March 3 of this year a case involving the question of whether or not reporting at an induction center constituted reporting for induction was decided in the United States District Court for the Southern District of New York. In this case, *United States* v. *John Angelo Collura* (not yet reported) a selectee named John Angelo Collura was indicted on a charge of "refusing to report for induction." In his defense Collura contended that he had reported for induction. The facts were that Collura had reported at an induction center but had balked as soon as it became evident to him that he would be vaccinated. Then he refused to go any further unless the Army would guarantee not to vaccinate him, but expressed his willingness to submit to induction provided the Army would give such guarantee. Collura was found guilty of "refusing to report for induction" and sentenced by Judge Henry W. Goddard

to 3 years in prison (The case has been appealed but the Circuit Court of Appeals has not yet handed down a decision).

If even the *conditional* refusal of Collura to submit to induction, after he had reported at the induction center, was punishable in a civil court then your petitioner's *unconditional* refusal to submit to induction ought surely to be. It matters not whether the charge be refusal to report for induction or refusal to submit to induction, either of these charges would be correct.

The respondent states that your petitioner, arriving at the induction center, "obviously did not remain free of the military power of restraint to prevent his leaving." But the question is whether petitioner should not have remained free of such restraint, particularly in view of the fact that it was his purpose to turn himself over to the civil authorities for arrest and imprisonment for refusal to report for induction—*to the civil authorities under whose jurisdiction he still was at the time of his arrest, by the military authorities* (R. 21, 29; and Section 11 of the Selective Training and Service Act), even under the Circuit Court's ruling as to when "induction was completed" (R. 55). Perhaps the respondent seeks by the statement quoted to back up the assertion of Captain Milligan, recorded in the transcript of testimony, that as soon as your petitioner entered the military reservation, he entered military jurisdiction (R. 21). Of course the Captain's statement was in a limited sense correct, just as (reverting to a previous analogy) it would have been in a limited sense correct to say that even under the old extraterritorial treaties an American citizen entered Chinese jurisdiction as soon as he entered China. But the Captain's assertion was not correct in any sense relevant to this case for, just as the old extraterritorial treaties prohibited the trial of an American by Chinese courts, unless the American had actually become a citizen of China, so the Selective Training and Service Act prohibits the

trial of a selectee by court martial unless the selectee has been "actually inducted" into the Army. Suppose to vary our previous analogy slightly, that the Chinese government, under the old extraterritorial treaties, had arrested an American citizen in Pekin who had refused to take upon himself the obligations of Chinese citizenship and thereby to renounce his rights as an American citizen, and by its unilateral act, against the American's unceasing protest, had "naturalized" him a Chinese citizen and had then given him an order to put his fingerprints on records which might make it appear that he had taken on the obligations of Chinese citizenship, an order which the American had refused to obey. It would have been absurd for the Chinese Government to assert that the American was not being kept in confinement for any act committed prior to his "naturalization," but for his continued refusal to obey a lawful Chinese command to be fingerprinted, and it is just as absurd for the Army to assert (page 10 of respondent's certiorari brief) that your petitioner "is not being held for any act committed prior to induction, but for his continued refusal to obey a lawful military order to be fingerprinted." The Chinese government, in the former instance, would obviously have violated the terms of the extraterritorial treaty, and the Army in the latter instance has just as obviously violated the terms of the Selective Training and Service Act.

The concluding sentence of the argument of the Brief for the Respondent in Opposition merely summarizes the previous contentions and adds nothing new.

Petitioner would respectfully submit that in the foregoing reply to the respondent's argument it has been conclusively demonstrated that the respondent's position in this case is legally and logically untenable.

In the concluding footnote of the respondent's brief it is contended that the issue of petitioner's draft classifi-

cation is not properly before the Court. Perhaps the contention is correct. That is for the Court to decide. Although the fact that petitioner is an objector was mentioned (R. 6) in his reply to the respondent's return to the Writ of Habeas Corpus, improper draft classification was not presented to the District Court as a legal ground for the grant of the writ. Petitioner was not at the time aware that his classification might be subject to review in the court.

[As a matter of fact petitioner would never have raised the issue at all if the Army had allowed him to turn himself over to the civil authorities for arrest and imprisonment for refusal to report for induction—he would not have raised it because he was in a way glad that his classification had put his principles to the acid test and left him no alternative but to submit to induction into a non-combatant branch of the Army or to stand by his pacifistic guns and to register his protest against war and conscription by deliberately refusing to submit to induction, and taking the consequences. But a new element was introduced into the situation by the Army's high-handed action and by the fact that the District and Circuit Courts, instead of supporting petitioner's claim to the right to be tried and punished as a civilian by the civil courts, upheld the Army's claim that it had "lawfully inducted" petitioner (simply by arresting him without a warrant, reading the oath of induction in his presence, and telling him when he refused to take it "That doesn't make any difference, you are in the Army now") and, by implication, the further claim that the Army could court-martial petitioner as if he were a soldier, not for his real offense of refusing to be inducted into or to serve in the Army, but on the trifling and misleading charge of refusing to submit to fingerprinting (misleading because petitioner would have no objection at all to submitting to finger printing if this did not involve obeying military orders as if he were a soldier). So, upon learning of the ruling in the case of *United States ex rel.*

Phillips v. Col. Downer, your petitioner—although remaining convinced that the legal grounds presented at the initiation of the habeas corpus proceeding were logically and legally more than sufficient to warrant his release from the hands of the military authorities into the hands of the civil authorities—decided to present the issue of his draft classification to the Supreme Court as a possible supplementary ground for the grant of the writ.]

It may be, as the respondent contends, that the evidence of the record is inadequate for the determination of such an issue. However, the record of petitioner's actions should be more than sufficient to establish that he is a conscientious or sincere objector to war and conscription. [It should be fairly obvious that, when a man has been found physically fit only for non-combattant service (R. 21) and has been given to understand that if he would go into the Army he might soon be a Captain (R. 33-34)—it is not just for the fun of it that he chooses instead: to face prison now and the probable sacrifice of a professorial career in the future, to lose his fair-weather friends, to make enemies of some fine people who do not understand his position, and to lay himself open to the sanctimonious vituperation of professional patriots.]

As to the question of whether or not it was the intent of Congress to include men like your petitioner in the category of objectors "by reason of religious training and belief," petitioner himself is in doubt. Although petitioner was raised in the Presbyterian Church, the training he received there has had little if anything to do with his present stand. When a student at the University of Kansas he discovered, enthusiastically joined, and became very active in the Humanist branch of the Unitarian Church, but it cannot be said that most of the members or ministers of the Unitarian church are now pacifists. He cannot say exactly where he got the idea, which some people now regard as strange, that, "no government has the right to make him a slave, to make him commit murder" (R. 17),

but he has that conviction, and it seems so very natural to him, that he finds it rather difficult to understand why he should have to demonstrate that he holds such a conviction "by reason of religious training and belief." It is, in your petitioner's view, a sad commentary on the state of human civilization that, in any country, let alone a "Christian" democracy, conscientious objection to war and conscription should be so much the exception rather than the rule, that any individual should ever have to prove he was conscientiously opposed to being forced as a slave to serve as an accomplice in the indiscriminate and wholesale murder and mayhem of fellow human beings who happened to have been born on the wrong side of certain man-made frontiers.

Wherefore, your petitioner would respectfully pray that the decision of the United States District Court of the District of Kansas, First Division, and of the United States Circuit Court of Appeals of the Tenth Circuit be reversed and that your petitioner be discharged from his unlawful confinement.

ARTHUR GOODWYN BILLINGS,
Petitioner.

LEE BOND,
Of Counsel.

APPENDIX

Excerpts from Daniel Webster's Speech on the Conscription Bill

Delivered in the House of Representatives on December 9, 1814

Mr. Chairman: After the best reflection which I have been able to bestow on the subject of the bill before you, I am of opinion that its principles are not warranted by any provision of the Constitution. It appears to me to partake of the nature of those other propositions for military measures which this session, so fertile in inventions, has produced. It is of the same class with the plan of the Secretary of War; with the bill reported to this House by its own Committee for filling the ranks of the regular army, by classifying the free male population of the United States; and with the resolution recently introduced by an honorable gentleman from Pennsylvania (Mr. Ingersoll), and which now lies on your table, carrying the principle of compulsory service in the regular army to its utmost extent.

This bill indeed is less undisguised in its object, and less direct in its means, than some of the measures proposed. It is an attempt to exercise the power of forcing the free men of this country into the ranks of an army, for the general purposes of war, under color of a military service. To this end it commences with a classification which is no way connected with the general organization of the militia, nor, to my apprehension, included within any of the powers which Congress possesses over them. All the authority which this Government has over the militia, until actually called into its service, is to enact laws for their organization and discipline. This power it has exercised. It now possesses the further

power of calling into its service any portion of the militia of the States, in the particular exigencies for which the Constitution provides, and of governing them during the continuance of such service. Here its authority ceases. The classification of the whole body of the militia, according to the provisions of this bill, is not a measure which respects either their general organization or their discipline. It is a distinct system, introduced for new purposes, and not connected with any power which the Constitution has conferred on Congress.

But, sir, there is another consideration. The services of the men to be raised under this act are not limited to those cases in which alone this Government is entitled to the aid of the militia of the States. These cases are particularly stated in the Constitution, "to repel invasion, suppress insurrection, or execute the laws." But this bill has no limitation in this respect. The usual mode of legislating on the subject is abandoned. The only section which would have confined the service of the militia, proposed to be raised, within the United States has been stricken out; and if the President should not march them into the Provinces of England at the north, or of Spain at the south, it will not be because he is prohibited by any provision in this act.

This, sir, is a bill for calling out the militia, not according to its existing organization, but by draft from new created classes;--not merely for the purpose of "repelling invasion, suppressing insurrection, or executing the laws," but for the general objects of war--for defending ourselves, or invading others, as may be thought expedient;--not for a sudden emergency, or for a short time, but for long stated periods; for two years, if the proposition of the Senate should finally prevail; for one year, if the amendment of the House should be adopted. What is this, sir, but raising a standing army out of the militia by draft, and to be recruited by draft, in like manner, as often as occasion may require?

This bill, then, is not different in principle from the other bills, plans, and resolutions which I have mentioned. The present discussion is properly and necessarily common to them all. It is a discussion, sir, of the last importance. That measures of this nature should be debated at all, in the councils of a free government, is cause of dismay. The question is nothing less than whether the most essential rights of personal liberty shall be surrendered, and despotism embraced in its worst form.

. . . . . .

I had hoped, sir, at an early period of the session, to find gentlemen in another temper. . . If it was not to have been expected that gentlemen would be convinced by argument, it was still not unreasonable to hope that they would lisetn to the solemn preaching of events. . . Although they had, last year, given no credit to those who predicted the failure of the campaign against Canada, yet they had seen that failure. . . They had seen much more than was predicted; for no man had foretold that our means of defence would be so far exhausted in foreign invasion, as to leave the place of our own deliberations insecure, and that we should this day be legislating in view of the crumbling monuments of our national disgrace. No one had anticipated that this city would have fallen before a handful of troops, and that British generals and British admirals would have taken their airings along the Pennsylvania Avenue, while the Government was in full flight, just awaked perhaps from one of its profound meditations on the plan of a conscription for the conquest of Canada. . . . .

. . . . . .

What is the evidence that the protection of the country is the object principally regarded? . . .

Or shall we look to the acquisition of the professed objects of the war, and there find grounds for approbation and confidence. The professed objects of the war are abandoned in all due form. The contest for sailors' rights

is turned into a negotiation about boundaries and military roads, and the highest hope entertained by any man of the issue, is that we may be able to get out of the war without a cession of territory.

Let us examine the nature and extent of the power which is assumed by the various military measures before us. In the present want of men and money, the Secretary of War has proposed to Congress a military conscription. For the conquest of Canada, the people will not enlist; and if they would, the treasury is exhausted, and they could not be paid. Conscription is chosen as the most promising instrument, both of overcoming reluctance to the service, and of subduing the difficulties which arise from the deficiencies of the exchequer. The administration asserts the right to fill the ranks of the regular army by compulsion. It contends that it may now take one out of every twenty-five men, and any part, or the whole of the rest, whenever its occasions require. Persons thus taken by force, and put into an army, may be compelled to serve there during the war, or for life. They may be put on any service, at home or abroad, for defence or for invasion, according to the will and pleasure of the Government. This power does not grow out of any invasion of the country, or even out of a state of war. It belongs to government at all times, in peace as well as in war, and it is to be exercised under all circumstances, according to its mere discretion. This, sir, is the amount of the principle contended for by the Secretary of War.

Is this, sir, consistent with the character of a free government? Is this civil liberty? Is this the real character of our Constitution? No, sir, indeed it is not. The Constitution is libelled, foully libelled. The people of this country have not established for themselves such a fabric of despotism. They have not purchased at a vast expense of their own treasure and their own blood a Magna Charta to be slaves. Where is it written in the Constitution, in

what article or section is it contained, that you may take children from their parents, and parents from their children, and compel them to fight the battles of any war in which the folly or the wickedness of government may engage it? Under what concealment has this power lain hidden which now for the first time comes forth, with a tremendous and baleful aspect, to trample down and destroy the dearest rights of personal liberty? Who will show me any constitutional injunction which makes it the duty of the American people to surrender everything valuable in life, and even life itself, not when the safety of their country and its liberties may demand the sacrifice, but whenever the purposes of an ambitious and mischievous government may require it? Sir, I almost disdain to go to quotations and references to prove that such an abominable doctrine has no foundation in the Constitution of the country. It is enough to know that that instrument was intended as the basis of a free government, and that the power contended for is incompatible with any notion of personal liberty. An attempt to maintain this dictrine upon the provisions of the Constitution is an exercise of perverse ingenuity to extract slavery from the substance of a free government. It is an attempt to show, by proof and argument, that we ourselves are subjects of despotism, and that we have a right to chains and bondage, firmly secured to us and our children by the provisions of our government. It has been the labor of other men, at other times, to mitigate and reform the powers of government by construction; to support the rights of personal security by every species of favorable and benign interpretation, and thus to infuse a free spirit into governments not friendly in their general structure and formation to public liberty.

The supporters of the measures before us act on the opposite principle. It is their task to raise arbitrary powers, by construction, out of a plain written charter of National Liberty. It is their pleasing duty to free us of the delusion, which we have fondly cherished, that we

are the subjects of a mild, free, and limited government, and to demonstrate by a regular chain of premises and conclusions, that government possesses over us a power more tyranical, more arbitrary, more dangerous, more allied to blood and murder, more full of every form of mischief, more productive of every sort and degree of misery than has been exercised by any civilized government, with a single exception, in modern times.

The Secretary of War has favored us with an argument on the constitutionality of this power. Those who lament that such doctrines should be supported by the opinion of a high officer of government, may a little abate their regret, when they remember that the same officer, in his last letter of instructions to our ministers abroad, maintained the contrary. In that letter he declares, that even the impressment of seamen, for which many more plausible reasons may be given than for the impressment of soldiers, is repugnant to our Constitution. It might therefore be a sufficient answer to his argument, in the present case, to quote against it the sentiments of its own author, and to place the two opinions before the House, in a state of irreconcilable conflict. Further comment on either might then be properly forborne, until he should be pleased to inform us which he retracted, and to which he adhered. But the importance of the subject may justify a further consideration of the arguments.

Congress having, by the Constitution, a power to raise armies, the secretary contends that no restraint is to be imposed on the exercise of this power, except such as is expressly stated in the written letter of the instrument. In other words, that Congress may execute its powers, by any means it chooses, unless such means are particularly prohibited. But the general nature and object of the Constitution impose as rigid a restriction on the means of exercising power as could be done by the most explicit injunctions. It is the first principle applicable to such a case, that no construction shall be admitted

which impairs the general nature and character of the instrument. A free constitution of government is to be construed upon free principles, and every branch of its provisions is to receive such an interpretation as is full of its general spirit. No means are to be taken by implication which would strike us absurdly if expressed. And what would have been more absurd than for this Constitution to have said that to secure the great blessings of liberty it gave to government an uncontrolled power of military conscription? Yet such is the absurdity which it is made to exhibit, under the commentary of the Secretary of War.

But it is said that it might happen that an army could not be raised by voluntary enlistment, in which case the power to raise armies would be granted in vain, unless they might be raised by compulsion. If this reasoning could prove anything, it would equally show, that whenever the legitimate power of the Constitution should be so badly administered as to cease to answer the great ends intended by them, such new powers may be assumed or usurped, as any existing administration may deem expedient. This is the result of his own reasoning, to which the secretary does not profess to go. But it is a true result. For if it is to be assumed, that all powers were granted, which might by possibility become necessary, and that government itself is the judge of this possible necessity, then the powers of government are precisely what it chooses they should be. Apply the same reasoning to any other power granted to Congress, and test its accuracy by the result. Congress has power to borrow money. How is it to exercise this power? Is it confined to voluntary loans? There is no express limitation to that effect, and, in the language of the secretary, it might happen, indeed it has happened, that persons could not be found willing to lend. Money might be borrowed then in any other mode. In other words, Congress might resort to a *forced* loan. It might take the money of any man

by force, and give him in exchange exchequer notes or certificates of stock. Would this be quite constitutional, sir? It is entirely within the reasoning of the secretary, and it is a result of his argument, outraging the rights of individuals in a far less degree than the practical consequences which he himself draws from it. A compulsory loan is not to be compared, in point of enormity, with a compulsory military service.

If the Secretary of War has proved the right of Congress to enact a law enforcing a draft of men out of the militia into the regular army, he will at any time be able to prove, quite as clearly, that Congress has power to create a Dictator. The arguments which have helped him in one case, will equally aid him in the other, the same reason of a supposed or possible state necessity, which is urged now, may be repeated then, with equal pertinency and effect.

Sir, in granting Congress the power to raise armies, the people have granted all the means which are ordinary and usual, and which are consistent with the liberties and security of the people themselves, and they have granted no others. To talk about the unlimited power of the Government over the means to execute its authority, is to hold a language which is true only in regard to despotism. The tyranny of arbitrary government consists as much in its means as in its ends; and it would be a ridiculous and absurd constitution which should be less cautious to guard against abuses in the one case than in the other. All the means and instruments which a free government exercises, as well as the ends and objects which it pursues, are to partake of its own essential character, and to be conformed to its genuine spirit. A free government with arbitrary means to administer it is a contradiction; a free government with an uncontrolled power of military conscription, is a solecism, at once the most ridiculous and abominable that ever entered into the head of man.

Sir, I invite the supporters of the measures before you to look to their actual operation. . . . If the war should continue, there will be no escape, and every man's fate and every man's life will come to depend on the issue of the military draft. Who shall describe to you the horror which your orders of conscription shall create in the once happy villages of this country? Who shall describe the distress and anguish which they will spread over those hills and valleys, where men have heretofore been accustomed to labor, and to rest in security and happiness. Anticipate the scene, sir, when the class shall assemble to stand its draft, and to throw the dice for blood. What a group of wives and mothers and sisters, of helpless age and helpless infancy, shall gather round the theatre of this horrible lottery, as if the stroke of death were to fall from heaven before their eyes on a father, a brother, a son, or a husband. And in a majority of cases, sir, it will be the stroke of death. Under present prospects of the continuance of the war, not one half of them on whom your conscription shall fall will ever return to tell the tale of their sufferings. They will perish of disease and pestilence, or they will leave their bones to whiten in fields beyond the frontier. Does the lot fall on the father of a family? His children, already orphans, shall see his face no more. When they behold him for the last time, they shall see him lashed, fettered, and dragged away from his own threshold like a felon and an outlaw. Does it fall on a son, the hope and the staff of aged parents? That hope shall fail them. On that staff they shall lean no longer. They shall not enjoy the happiness of dying before their children. They shall totter to their grave, bereft of their offspring and unwept by any who inherit their blood. Does it fall on a husband? The eyes which watch his parting steps may swim in tears forever. She is a wife no longer. There is no relation so tender or so sacred that by these accursed measures you do not propose to violate it. There is no happiness so perfect that you do not pro-

pose to destroy it. Into the paradise of domestic life you enter, not indeed by temptations and sorceries, but by open force and violence.

Nor is it, sir, for the defense of his own house and home, that he who is the subject of military draft is to perform the task allotted to him. . . . If, sir, in this strife he fall -- if, while ready to obey every rightful command of government, he is forced from his home against right, not to contend for the defense of his country, but to prosecute a miserable and detestable project of invasion, and in that strife he fall, 'tis murder. It may stalk above the cognizance of human law, but in the sight of Heaven it is murder; and though millions of years may roll away, while his ashes and yours lie mingled together in the earth, the day will yet come when his spirit and the spirits of his children must be met at the bar of omnipotent justice. May God, in his compassion, shield me from any participation in the enormity of this guilt.

I would ask, sir, whether the supporters of these measures have well weighed the difficulties of their undertaking. Have they considered whether it will be found easy to execute laws which bear such marks of despotism on their front, and which will be so productive of every sort and degree of misery in their execution? . . . The operation of measures thus unconstitutional and illegal ought to be prevented by a resort to other measures which are both constitutional and legal. It will be the solemn duty of the State Governments to protect their own authority over their own militia, and to interpose between their citizens and arbitrary power. These are among the objects for which the State Governments exist; and their highest obligations bind them to the preservation of their own rights and the liberties of their people. I express these sentiments here, sir, because I shall express them to my constituents. Both they and myself live under a constitution which teaches us that "the doctrine of non-re-

sistance against arbitrary power and oppression is absurd, slavish, and destructive of the good and happiness of mankind."* With the same earnestness with which I now exhort you to forbear from these measures, I shall exhort them to exercise their unquestionable right of providing for the security of their own liberties.

In my opinion, sir, the sentiments of the free population of this country are greatly mistaken here. The nation is not yet in a temper to submit to conscription. The people have too fresh and strong a feeling of the blessings of civil liberty to be willing thus to surrender it. You may talk to them as much as you please, of the victory and glory to be obtained in the enemy's provinces; they will hold these objects in light estimation if the means be a forced military service. You may sing to them the song of Canada Conquest in all its variety, but they will not be charmed out of the remembrance of their substantial interests and true happiness. Similar pretences, they know, are the grave in which the liberties of other nations have been buried, and they will take warning. . . . .

. . . . . Those who cry out that the Union is in danger are themselves the authors of that danger. They put its existence to hazard by measures of violence, which it is not capable of enduring. They talk of dangerous designs against the Government, when they are overthrowing the fabric from its foundations. They alone, sir, are friends to the Union of the states, who endeavor to maintain the principles of civil liberty, in the country, and to preserve the spirit in which the Union was framed.

(From *The Writings and Speeches of Daniel Webster;* Little, Brown & Co., Boston, 1903; Volume 14, pages 55-69. The New Hampshire Historical Society has the original manuscript in Mr. Webster's handwriting.)

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*N. H. Bill of Rights.

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 215

ARTHUR GOODWIN BILLINGS, PETITIONER

v.

KARL TRUESDELL, MAJOR GENERAL, UNITED STATES ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals is reported at 135 F. (2d) 505.[1] The opinion of the district court (R. 9–12)[2] is reported at 46 F. Supp. 663.

[1] No copy of the opinion of the circuit court of appeals has been paginated to the record.

[2] This reference is to the volume entitled "Transcript of Record" filed in the circuit court of appeals. The reference "Tr." used herein is to the separate volume consisting of the transcript of testimony taken in the district court.

JURISDICTION

The judgment of the circuit court of appeals was entered May 5, 1943. The petition for a writ of certiorari was filed July 30, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether petitioner was legally inducted into the Army of the United States, despite his refusal to subscribe to an oath of allegiance and obedience, and so became subject to military jurisdiction.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are set forth in the Appendix, *infra*, pp. 12–17.

STATEMENT

Petitioner is thirty-two years of age (see Tr. 11). He graduated from the University of Kansas in 1933, spent two years at the University of Paris, served three years in the American Embassy in Moscow under Ambassadors Bullitt and Davies, traveled for four months in China and Japan in 1938, studied three years at Harvard University, receiving a master's degree and completing two-thirds of the work toward a doctorate, and became a member of the economics faculty of the University of Texas in 1941 (Tr. 14–15). He registered in the first draft registration in October

1940 with Local Board No. 1 of Ottawa County, Kansas, stating on his card at the time that he would never serve in the Army (Tr. 11). He was originally given a I–B classification because of defective eyesight, but was reclassified I–A in January 1942 (Tr. 12). The local board's rejection of his claim to being a conscientious objector was upheld on his appeal to the board of appeal (Tr. 12–14).

The local board notified him to report at its headquarters at Minneapolis, Kansas, at 10:45 A. M. on August 12, 1942, for the purpose of proceeding from there with a group to the induction center at Fort Leavenworth (Tr. 22–23). Petitioner, while at all times determined that he would never submit to induction into the military forces, desired to comply with all orders down to the point of actual induction, in order to avoid unnecessarily subjecting himself to civil penalties. He consulted draft officials in Texas and members of the law faculty of the University of Texas, and became convinced that he could not be inducted without subscribing to an oath or affirmation—that until he did so the military jurisdiction could not attach to him. (Tr. 11–22, 33–35; 47.) Upon receipt of the board's order to report he therefore proceeded to Kansas City in the hope that he would be rejected for defective eyesight, intending to comply with all orders down to the point of acceptance by the military authorities but

to refuse, if accepted, to submit to induction by the taking of an oath. His assumption was that in this way he would remain outside the military jurisdiction and suffer only civil penalties. At Kansas City he phoned the offices of the United States Attorney, United States Marshal, and the Federal Bureau of Investigation, inquiring as to where to surrender to the civil authorities for refusal to take the oath, in the event of his being accepted by the Army. (Tr. 42, 47–48.) He also called his local draft board and was told by its secretary that he would be reported delinquent for not appearing in Minneapolis, but she also directed him to join the group from Minneapolis at Victory Junction, Kansas, and to proceed with it from there to Fort Leavenworth, which he did (Tr. 22–24).

At Fort Leavenworth he reported with the group from Minneapolis, spent the night of August 12 in an Army barracks, was taken with the group to breakfast the next morning by a soldier in uniform, and then was given both physical and mental examinations and accepted for I–B noncombatant service (Tr. 24–27). Upon refusing to comply with an order to be fingerprinted if it should be deemed to involve induction into the Army, he was taken to Captain Milligan and Lieutenant Nemec, and was told by them that he was already in the Army (Tr. 28). They refused to allow him to turn himself over to the civil authori-

ties, or to release him unless he should agree not to do so, but did allow him to phone the offices of the United States Marshal and United States Attorney. At his request he was furnished by the latter's office with the names of several attorneys, one of whom (Mr. Reilly) he then retained by telephone to file a petition for a writ of habeas corpus on his behalf. Mr. Reilly asked the officers by telephone to delay the reading of the oath to petitioner for twenty-four hours, which they refused to do. The oath was then read to petitioner, but he refused to stand while it was being read or to subscribe to it. He was told that his refusal made no difference and that he was in the Army, and was then ordered to the guardhouse. (Tr. 28–31.)

Subsequent attempts by the military authorities and others to reason with and persuade petitioner to recognize and perform his duty proved unavailing (Tr. 49–52, 59). At the time of the filing of the return to the writ of habeas corpus (R. 5), he was held in confinement under charges of refusal to obey a military command to be fingerprinted (Tr. 36, 37, 46, R. 6).

In discharging the writ and remanding petitioner to respondent's custody, the district court held that petitioner was subject to military jurisdiction—that induction had occurred "by operation of law" upon his acceptance by the military authorities, and that the subsequent reading of the

oath was mere formality (R. 16). Upon appeal to the Circuit Court of Appeals for the Tenth Circuit, the judgment of the district court was unanimously affirmed. While agreeing that a selectee "cannot avoid induction by refusing to take the oath," the circuit court of appeals was of the opinion that induction was completed "when the oath was read to petitioner and he was told that he was inducted into the Army."

ARGUMENT

In substance petitioner's argument that he was not legally inducted into the Army is based upon the proposition that the obligation imposed by the Selective Training and Service Act is not specifically enforceable and that punishment for civil disobedience is the extreme sanction whereby, under the Constitution, the United States may exercise its power to raise armies and resist aggression. As a constitutional proposition it is self-refuting.[3] The express power to levy war may not thus be legally nullified by a citizen's or citizenry's choice of prison in preference to war. It contemplates and exacts of the citizen more effective service than the suffering of civil punishment.

Petitioner's position is no stronger under the provisions of the Selective Training and Service Act and the regulations issued thereunder. The

[3] *Selective Draft Law Cases*, 245 U. S. 366, 378, 390.

statute (Appendix, *infra*, pp. 12–14) speaks in terms of compulsory military service. Thus, the declaration of Congressional policy in Section 1 (b) assumes the existence of obligations to be "shared generally in accordance with a fair and just system of selective compulsory military training and service." Section 3 (a) provides that specified male citizens and non-citizens "shall be *liable* for" such training and service (italics supplied) and authorizes the President "to select and induct" such persons into land and naval forces. And Section 4 (a) likewise speaks in terms of "the selection" of men "liable" for training and service. In providing that "no man, without his consent, shall be inducted for training and service under this Act after he has attained the forty-fifth anniversary of the day of his birth," Section 3 (a) clearly presupposes that actual induction may proceed without the selectee's own consent in other cases. It is his proving "acceptable to the land forces" that constitutes the basis of, and last condition precedent to, induction. This phrase appears twice in Section 3 (a). In the second instance of its use it is a requirement of universal application. In the first it is a part of a more limited requirement that "no citizen or subject of any country who has been or may hereafter be proclaimed by the President to be an alien enemy of the United States shall be inducted for training and service under this

Act unless he is acceptable to the land or naval forces." But this has been held to confer no right upon the alien to prevent or avoid induction, and to mean merely "that an enemy alien cannot be inducted, voluntarily or otherwise, unless he is acceptable to the land or naval forces."[4]

Proving "acceptable to the land or naval forces" obviously is no more for the citizen selectee's benefit than for the alien's, and an unequivocal indication by the military authorities, after examination, of their acceptance, is in either case tantamount to induction. The Selective Service Regulations use the word "induction" as the antithesis of "rejection"—in other words as meaning simply "acceptance" by the land or naval forces. 32 C. F. R., 1941 Supp., 633.8, Appendix, *infra*, pp. 15–16. In a case presenting the same issue as the one here, the court in *United States ex rel. Diamond* v. *Smith*, 47 F. Supp. 607, 609 (D.

[4] *United States ex rel. Cascone* v. *Smith*, 48 F. Supp. 842, 843 (D. Mass.). Army Regulations No. 615–500, Sec. II, Par. 7, a, (2), (b), 2, provide: "No enemy alien or subject of a country allied with the enemy will be accepted if he objects in writing to service in the Army." Cascone was inducted despite his statement in writing that "I am willing to serve in the armed forces of the United States, but cannot feel free to offer my services for combat duty." On habeas corpus the court held: "Whether or not this was adequate compliance is not open to this petitioner, since the regulations were provided for the benefit of the Army, and not to detract from the Congressional authority. The petitioner's acceptability was properly determined, and he is properly in the armed forces of the United States."

Mass.), held that "if a man successfully passes the physical examination and is accepted by the Army for training and service, he is inducted into the Army whether he takes the oath administered to him or not." A proposition that subscription to an oath or affirmation is a condition precedent to completion of a procedure that by hypothesis is compulsory throughout, is self-contradictory. Neither the Selective Training and Service Act nor the Selective Service Regulations require that a selectee subscribe to an oath.[5] The oath requirement of Article 109 of the Articles of War (Appendix, *infra*, 16), which has been held applicable of its own force only to men who voluntarily enlist,[6] by its terms presupposes that the taker is already a soldier.[7] War Department Mobilization Regulation No. 1–7, Par. 13e (4) (*infra*, p. 17), expressly covers the contingency of a selectee's refusal to take the oath asked of him under this regulation. Applying the test of *Ver Mehren* v. *Sirmyer*, 36 F. (2d) 876, 881 (C. C. A. 8), relied on by petitioner (Pet. 8, 16–17), "all the steps prescribed by

[5] It is significant that the only requirement of an oath made by the Regulations is in the case of voluntary civilian personnel of the Selective Service System, 32 C. F. R., 1941 Supp., 602.4, 604.75 (a) (1), and of witnesses before the boards, 32 C. F. R., 1941 Supp., 603.57.

[6] *Franke* v. *Murray*, 248 Fed. 865, 868–869 (C. C. A. 8).

[7] See *United States ex rel. Diamond* v. *Smith*, 47 F. Supp. 607, 609 (D. Mass.): "The taking of the oath would seem to follow induction, not precede it."

statute, and by regulations having the force of law," having been strictly followed in the present case, petitioner therefore was legally inducted.

It follows that petitioner is subject to military jurisdiction. He is not being kept in confinement for any act committed prior to induction, but for his continuing refusal to obey a lawful military command to be fingerprinted. The exact moment at which, after he reported at the induction center, restraint was first placed upon his person is immaterial. A sufficient answer to his contention that he did not report for induction (Pet. 13), is that he reported at the induction center. Arriving there, he obviously did not remain free of the military power of restraint to prevent his leaving. To contend otherwise is to contend that in enacting a compulsory service law Congress did not mean what it said, but created instead a legal duty which a selectee may not be compelled to perform.[8]

[8] Petitioner's contention (Pet. 18–23) that the draft and appeal boards erred in denying him classification as a conscientious objector is not properly before this Court. No such contention was presented to either of the courts below and the evidence of record is an inadequate basis for determination of such an issue. For all that appears the action of the boards was based solely upon a determination of fact upon sufficient evidence and was therefore conclusive. *Bowles* v. *United States*, decided May 3, 1943, No. 589, October Term, 1942, rehearing denied, June 7, 1943. Indeed, petitioner conceded at the hearing in the district court that he had been given a full and fair hearing by the local board and the Department of Justice Hearing Office (Tr. 12–14).

CONCLUSION

No issue calling for review by this Court is presented. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.
TOM C. CLARK,
Assistant Attorney General.
ROBERT S. ERDAHL,
EDWARD G. JENNINGS,
Special Assistants to the Attorney General.

SEPTEMBER 1943.

APPENDIX

The Selective Training and Service Act of 1940, as amended (Acts of September 16, 1940, c. 720, 54 Stat. 885; Aug. 18, 1941, c. 362, 55 Stat. 626; Dec. 20, 1941, c. 602, 55 Stat. 844; Nov. 13, 1942, c. 638, 56 Stat. 1018),* in pertinent part provides:

> SECTION 1. (b) The Congress further declares that in a free society the obligations and privileges of military training and service should be shared generally in accordance with a fair and just system of selective compulsory military training and service. (50 U. S. C. 301 (b).)
>
> * * * * *
>
> SEC. 3. (a) Except as otherwise provided in this Act, every male citizen of the United States * * * who is between the ages of eighteen and forty-five at the time fixed for his registration, shall be liable for training and service in the land or naval forces of the United States: * * * *Provided further,* that no citizen or subject of any country who has been or who may hereafter be proclaimed by the President to be an alien enemy of the United States shall be inducted for training and service under this Act unless he is acceptable to the land or naval forces. The President is authorized from time to time * * * to select and induct into

* Amendments enacted after the facts of the present case arose in no way affect the pertinent provisions.

the land and naval forces of the United States for training and service, in the manner provided in this Act, such number of men as in his judgment is required for such forces in the national interest: * * * *Provided further,* that no man shall be inducted for training and service under this Act unless and until he is acceptable to the land or naval forces for such training and service and his physical and mental fitness for such training and service has been satisfactorily determined: * * * *Provided further,* that no man, without his consent, shall be inducted for training and service under this Act after he has attained the forty-fifth anniversary of the day of his birth. (50 U. S. C., Supp. II, 303 (a).)

* * * * *

SEC. 4. (a) The selection of men for training and service under section 3 * * * shall be made in an impartial manner, under such rules and regulations as the President may prescribe, from the men who are liable for such training and service and who at the time of selection are registered and classified but not deferred or exempted: * * *. (50 U. S. C., Supp. II, 304 (a).)

* * * * *

SEC. 10. (a) The President is authorized—

(1) To prescribe the necessary rules and regulations to carry out the provisions of this Act. (50 U. S. C. 310 (a) (1).)

* * * * *

SECTION 11. Any person * * * who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act * * * shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by any military or naval court martial in any case arising under this Act unless such person has been actually inducted for the training and service prescribed under this Act or unless he is subject to trial by court martial under the laws in force prior to the enactment of this Act. * * * (50 U. S. C. 311.).

The Selective Service Regulations (32 C. F. R. 1941 Supp., 601.7 *et seq.*) in pertinent parts provide:

601.7. *Inducted man.*—An "inducted man" is a man who has become a member of the land or naval forces through the operation of the Selective Service System.

601.8. *Induction station.*—The term "induction station" refers to any camp, post, ship, or station at which selected men are received by the military authorities and, if found acceptable, are inducted into military service.

* * * * *

633.1. *Order to Report for Induction (Form 150).*—(a) Immediately upon determining which men are to report for induction, the local board shall prepare for each man an Order to Report for Induction (Form 150), in triplicate. * * *

* * * * *

633.2. *Appointment of leader and assistant leader.*—(a) After selecting the registrants who are to fill the call, the local board shall designate one selected man to be the leader of the group and one or more to be assistant leaders. * * *

* * * * *

633.6 *Procedure before delivery.*—(a) At the time and place designated for the selected men to report for delivery, the local board shall:

(1) Call the roll of selected men.

(2) Read and issue the appointment of the leader and assistant leaders.

(3) Turn over to the leader the transportation request or tickets, the meal and lodging requests, and the records for the induction station.

(4) Notify the leader of arrangements that have been made at the induction station for the reception of the selected men.

(5) Specifically order the selected men to obey the leader and assistant leaders.

(6) Specifically order the selected men to report to the induction station.

* * * * *

633.8. *Reception of selected men at the induction station and return of rejected men.*—In the manner and to the extent prescribed by regulations of the land or naval forces, the commanding officer of the induction station is required to have the

selected men met at the railroad station or bus terminal, transported to the induction station, and provided with food and lodging after their arrival and pending their induction or rejection. In the manner and to the extent prescribed by the regulations of the land or naval forces, the commanding officer of the induction station is required to provide transportation and subsistence for the return of the selected men who have been rejected.

633.9. *Induction.*—At the induction station, the selected men found acceptable will be inducted into the land or naval forces.

Article 109 of the Articles of War (41 Stat. 787, 809; 10 U. S. C. 1581) provides:

> At the time of his enlistment every soldier shall take the following oath or affirmation: "I, ----------, do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to the Rules and Articles of War." This oath or affirmation may be taken before any officer.

The War Department Mobilization Regulations in pertinent part provide (M. R. 1–7, Par. 13e):

> Induction ceremony.—
>
> (1) All men successfully passing the physical examination will be immediately inducted into the Army. The induction will be performed by an officer in a short,

dignified ceremony in which the men are administered the oath, Article of War 109:

* * * * * *

(4) They will be informed that they are now members of the Army of the United States and given an explanation of the obligations and privileges. In the event of refusal to take the oath (or affirmation) of allegiance by a declarant alien or citizen he will not be required to receive it, but will be informed that this action does not alter in any respect his obligation to the United States. * * *

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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 215

ARTHUR GOODWYN BILLINGS, PETITIONER

v.

KARL TRUESDELL, MAJOR GENERAL, UNITED STATES ARMY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 52–55) is reported at 135 F. (2d) 505. The opinion of the district court (R. 38–48) is reported at 46 F. Supp. 663.

JURISDICTION

The judgment of the circuit court of appeals was entered May 5, 1943 (R. 56). The petition for a writ of certiorari was filed July 30, 1943, and was granted October 11, 1943 (R. 56). The jurisdiction of this Court rests upon Section 240

(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether petitioner, a registrant under the Selective Training and Service Act of 1940 who reported for induction as ordered by his draft board, is lawfully in the custody of the Army of the United States, despite his refusal to subscribe to an oath of allegiance and obedience.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are set forth in the Appendix, *infra*, pp. 35 *et seq.*

STATEMENT

Pursuant to the Selective Training and Service Act of 1940 (see pp. 35–37, *infra*) petitioner registered in the first draft registration in October 1940, with Local Board No. 1 of Ottawa County, Kansas, expressing on his card his intention never to serve in the army (R. 12). After physical examination petitioner was classified in I–B, as fit only for limited service because of defective vision; he later was classified in I–H [1] because he was then older than 28 years; subsequently he was placed in I–A after the Local Board's denial

[1] I–H is an abolished classification in which men over 28 years of age and without dependents were placed pursuant to 55 Stat. 621 at the time when, prior to the entry of the United States into the war, men over 28 were not being drafted.

of his claim to classification as a conscientious objector (R. 12–13). On appeal petitioner's I–A classification was affirmed (R. 12–13).[2]

Petitioner, a well-educated person (R. 13–14)[3] adhering to an intellectual position which he describes as "somewhat like that" of Mohandas K. Gandhi (R. 16), had determined never to serve in the army (R. 12). He desired, however, to comply with all of the Selective Service requirements short of actual induction into the armed forces in order to avoid subjecting himself unnecessarily to civil penalties (Pet. 2–3). He consulted with draft officials in Texas and members of the University of Texas law faculty, and apparently concluded that taking the oath of induction was a prerequisite to becoming a member of the armed forces (R. 24–25). He determined not to take such oath and anticipated going to a civil prison rather than to a military guard house (R. 24). He was ordered by his local board to report on August 12, 1942, at 10:45 A. M. at

[2] Petitioner acknowledges that he was "fairly" allowed to present his claim to classification as a conscientious objector (R. 12–13).

[3] Petitioner, who is now 32 years old (R. 12), was graduated from the University of Kansas in 1933, spent two years at the University of Paris, served three years in the American Embassy at Moscow, and in 1938 traveled for four months in the Orient; he then studied for three years at Harvard University where he received his master's degree and passed his general examinations looking toward a doctorate, and thereafter taught economics at the University of Texas (R. 13–14).

Minneapolis, Kansas, in order to proceed thence to the induction center at Fort Leavenworth (R. 18–19). In order to prevent the army authorities from making notations on the induction order and returning it to his draft board he later tore up the paper (R. 18, Pet. Exh. 1). Nevertheless, compliant with the order, he proceeded to Kansas City (R. 31), apparently en route to Minneapolis, Kansas, in the hope that he might be rejected for defective eyesight (R. 29), but determined to refuse to take the oath (R. 32), the taking of which he deemed necessary for inception of military jurisdiction over him (R. 31). While at Kansas City he inquired of the Federal Bureau of Investigation, the United States Attorney, and the United States Marshal as to where he might surrender to civil authorities for refusing to take the oath in the event that he should pass his physical examination (R. 31–32).[4] Petitioner also called his local draft board and was told by the secretary of the board that he would be reported delinquent for failing to appear in Minneapolis, but that a bus bearing the selectees who were required to report from Minneapolis

[4] Petitioner had earlier written a letter of resignation to the University of Texas stating in advance of the event that he had passed his physical examination, had been ordered into the Army, had refused to serve, and therefore probably would be arrested and imprisoned (R. 29). It is likely, however, that this letter was never sent, since after acceptance into the Army petitioner by telegram resigned from the university faculty (R. 23).

would pass through Victory Junction, Kansas, at a designated time (R. 18–19). On August 12, at Victory Junction, Kansas, he joined the group selected for induction and was transported to the induction center at Fort Leavenworth (R. 19).

At Fort Leavenworth petitioner and his group spent the night in the barracks, and next morning were conducted by a soldier to the mess hall for breakfast; thereafter petitioner was given both physical and mental examinations, at the end of which he was informed that he had been accepted for I–B limited service (R. 49, 19–21). Upon being escorted to the presence of Lieutenant Nemec and Captain Milligan at the induction office he informed these officers that he was going to refuse to serve in the army. He was then told that "you are already within our jurisdiction." (R. 21.)[5] Petitioner told the officers that he wanted to surrender to civil authorities and learned that he would not be permitted to do so (R. 21), but he was allowed to use the telephone and thereby procured the services of an attorney, William D. Reilly, whom he retained to file a petition for habeas corpus on his behalf (R. 21–22). Next, Lieutenant Nemec read petitioner the oath of

[5] The transcript of record as originally filed with this Court recites only that responsively to petitioner's statement that he would refuse to serve in the Army the officers told him "you are already" (Tr. 28), but by stipulation the parties have agreed to supply the phrase, "in our jurisdiction," following the word "already" (R. 21).

induction to which petitioner refused to respond by standing or raising his hand, although requested to do so, and to which he replied, "I do not. I refuse to take this oath" (R. 22). The Lieutenant informed petitioner that his refusal made no difference, that "you are in the Army now" (R. 22, 29).[6] Thereupon Lieutenant Nemec ordered petitioner to be fingerprinted and upon his refusal to do so he was ordered to the guardhouse, and military charges were preferred against him for willful disobedience to a lawful command of his superior officer (R. 22, 25, 31, 45, 53; Pet. 5).[7] Subsequent attempts by the military authorities and others to reason with and persuade petitioner to recognize and perform his duty proved unavailing (R. 32–34).

On August 14, 1942, petitioner by his attorney, Reilly, filed a petition for writ of habeas corpus with the District Court for the District of Kansas. This petition alleged that since petitioner was not a member of the armed forces he was being unlawfully restrained by respondent, that he was not subject to military jurisdiction and that if he

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[6] Petitioner testified that he was then "simply flabbergasted * * * because * * * everybody said without any hesitation that you were not in the Army until you subscribed to the oath of induction * * *" (R. 31).

[7] By the stipulation correcting the record, suggested by petitioner (see n. 5, *supra*), an addition to petitioner's testimony as it appears at page 31 of the typewritten transcript has been supplied to make it clear that the sequence of events was: (1) the tendering of the oath, (2) the order requiring fingerprinting, (3) detention in the guardhouse (R. 21–22).

violated any laws they are civil laws. (R. 1.) On August 15, 1942, the writ issued (R. 2–3). Respondent filed a return (R. 3–5),[*] petitioner replied thereto (R. 5–6), and on August 18, 1942, a hearing was had (R. 6) in which petitioner testified in his own behalf (R. 11–38). On September 11, 1942, the district court discharged the writ and remanded petitioner to respondent's custody (R. 50), holding that petitioner was subject to military jurisdiction, that induction occurred "by operation of law" as a result of "not the acceptance by him of the oath, but the acceptance by the government of him as a soldier"; the court further ruled that "the giving of an oath and admonition that you now are in the Army, constitute mere formality" (R. 45). The Circuit Court of Appeals for the Tenth Circuit unanimously affirmed the judgment of the district court. That court was of the opinion that the process of induction was completed, regardless of petitioner's choice in the

[*] The return discloses that petitioner, under charge of violation of Article 64 of the Articles of War, Act of June 4, 1920, ch. 227, subc. II, sec. 1, 41 Stat. 801, 10 U. S. C., sec. 1536, was confined at the post guardhouse. The charge specified that petitioner "having received a lawful command from 1st Lt. Godfrey B. Nemec, Infantry, his superior officer, to affix his fingerprints to an induction record, did at Fort Leavenworth, Kansas, on or about August 13, 1942, willfully disobey the same" (R. 4). Article 64 provides in part: "Any person subject to military law who, on any pretense whatsoever * * * willfully disobeys any lawful command of his superior officer, shall suffer death or such other punishment as a court-martial may direct."

matter, "when the oath was read to petitioner and he was told that he was inducted into the Army." (R. 55.)

SUMMARY OF ARGUMENT

1. The 2nd Article of War provides in part that "all * * * persons lawfully * * * drafted * * * into" the military service are subject to military law "from the dates they are required by the terms of the call, draft or order to obey the same." This provision has been modified by the Selective Training and Service Act of 1940 in two possible respects, neither of which has any effect on the outcome of this case: *First,* Section 3 provides in part that no man shall be inducted unless and until he is acceptable to the armed forces and his fitness has been determined, and this provision, which postpones selectees' induction until the armed forces have accepted them, may have the effect as well of postponing the attachment of military law until the selectee has been accepted; *second,* Section 11 provides in part that "no person shall be tried by any military or naval court martial in any case arising under this Act unless such person has been actually inducted * * * or unless he is subject to trial by court martial under laws in force prior to the enactment of this Act," and this provision, which because of the concluding saving clause could be construed to save the entire jurisdiction which the Articles of War confer on courts martial over selectees, is shown by the legislative

history to have been intended to deprive courts martial of jurisdiction to try selectees for failure to report for induction. Section 3 has no effect here because petitioner has been accepted by the Army, and was accepted prior to the time he sought to leave the post, and therefore the optimum effect of Section 3 as a modification of Article 2 cannot benefit petitioner. Section 11 has no effect here because petitioner is not being held for refusal to report for induction nor for any other violation of the Selective Service Act. He is in military custody charged with refusal, after the Army had accepted him and read the oath to him, to obey an order of his superior officer. This offense has no counterpart in the Selective Service Act and was committed after petitioner became subject to military law; thus petitioner is lawfully in military custody.

2. Approaching the case differently, petitioner is rightfully in the custody of the Army because he is a soldier in the Army and has been since the Army determined that he was acceptable for service. The effect of Article 2 of the Articles of War doubtless would be to induct a selectee into the armed forces from the moment when he is required to report for induction, as in World War I, if it stood alone. But Section 3 of the Selective Training and Service Act of 1940 has postponed the time of induction until the armed forces have determined that the selectee is accept-

able. No provision in the statutes or regulations further postpones the time of induction or requires the taking of an oath. The controlling Army Mobilization Regulations provide that the oath of enlistment shall be given the selectees but they also provide that failure of a selectee to take the oath will not affect his obligation to the United States. Thus the regulations treat the oath as a formality to bring home to the new soldier the significance and obligations of his new status, and not as a step upon which effectiveness of induction depends. Petitioner was therefore properly restrained from leaving the post even though the oath had not yet been read to him, and his refusal to take the oath is without significance.

3. Even if the foregoing arguments were unsound, petitioner would not be entitled to release from military custody. The Army Regulations require merely that the oath be read to the selectee and state that his refusal to subscribe to it does not alter his obligation to the United States. The oath was read to petitioner and if he was not already in the Army he thereupon entered it. The Army was within its rights in restraining petitioner from leaving the post before the oath was read to him. Petitioner had proved acceptable to the Army and the Army had jurisdiction to protect its interest in a conscript until the final step in induction could be taken. This step having been taken, petitioner is therefore in the Army, and as the act for which he is held awaiting mili-

tary trial occurred after his entry into the Army he is properly in respondent's custody.

ARGUMENT

PETITIONER IS LAWFULLY IN THE CUSTODY OF THE ARMY

Introductory.—Petitioner seeks release through habeas corpus from the custody of the Army, on the ground that he has not been lawfully inducted into the Army and therefore is entitled to be freed for trial in the civil courts for failure to report for induction under the Selective Training and Service Act of 1940. He also contends that he was improperly denied Selective Service classification as a conscientious objector and that he should be released for this additional reason, but this issue is not properly presented and is not before the Court.[9] He asserts also that for various reasons Congress is without constitutional power to enact and enforce a compulsory military

[9] This is so for two reasons: *first*, the issue is not framed by the pleadings, for petitioner's reply to the return (R. 5–6) makes it clear, even if the petition for a writ (R. 1) does not, that the ground advanced for relief was that since he had not agreed to the oath he had not been inducted into the Army, and his reference to his being a conscientious objector was to explain why he was refusing to serve and not to attack his draft classification; *second*, the record is inadequate for decision of this question since the Selective Service file, containing the evidence on which the draft boards acted, is not in the record. Cf. *Miss. Valley Barge Co.* v. *United States*, 292 U. S. 282. There is no suggestion that petitioner sought to introduce his file and that it was denied him, as in *Bowles* v. *United States*, 319 U. S. 33.

service law, but this can hardly be considered an open question. See *Selective Draft Law Cases*, 245 U. S. 366; cf. *Falbo* v. *United States*, No. 73, decided January 3, 1944.

I

PETITIONER BECAME FULLY AMENABLE TO MILITARY JURISDICTION NOT LATER THAN WHEN HIS PHYSICAL EXAMINATION WAS COMPLETE AND HE PROVED ACCEPTABLE TO THE ARMY

Petitioner is held in custody charged with the violation of the 64th Article of War (R. 4), which provides in part as follows:

> Any person subject to military law who, on any pretense whatsoever, * * * willfully disobeys any lawful command of his superior officer, shall suffer death or such other punishment as a court-martial may direct. (10 U. S. C. § 1536.)

Whether petitioner is subject to this article depends on whether he is a "person subject to military law," and this in turn depends on the meaning and continuing effect to be given to the following portions of the 2nd Article of War (10 U. S. C. § 1473):

> The following persons are subject to these articles and shall be understood as included in the term "any person subject to military law" * * *, whenever used in these articles:
>
> (a) All officers, * * * and soldiers belonging to the Regular Army of the

> United States; all volunteers, from the dates of their muster or acceptance into the military service of the United States; and all other persons lawfully called, drafted, or ordered into, or to duty or for training in the said service, from the dates they are required by the terms of the call, draft or order to obey the same;[10]

Petitioner, having been lawfully ordered into the military service, is in the last category and under the terms of Article 2 standing alone he became subject to military law on August 12, 1942, the date when he was required by the terms of the call to present himself for induction.[11] Petitioner's disobedience of an officer's order to submit to fingerprinting occurred after that date and also

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[10] The potential reservoir from which persons in the last category could come was, before enactment of the Selective Training and Service Act of 1940, indicated by Section 1, c. 187, of the Act of April 22, 1898, (30 Stat. 361, 10 U. S. C., § 1), which provides:

"All able bodied male citizens of the United States, and persons of foreign birth who shall have declared their intention to become citizens of the United States under and in pursuance of the laws thereof, between the ages of eighteen and forty-five years, are hereby declared to constitute the national forces, and, with such exceptions and under such conditions as may be prescribed by law, shall be liable to perform military duty in the service of the United States."

[11] As explained hereinafter (pp. 19–25), it is our position that Article 2 has been modified by Section 11 of the Selective Training and Service Act of 1940, so that it no longer subjects conscripts to court martial for failure to obey the order to appear for induction, but it has not been otherwise modified.

after petitioner had complied with the call at least to the extent of presenting himself, being examined and being accepted by the Army. Since petitioner's detention is based on that disobedience, his detention is lawful under Article 2 unless that Article has been suspended or made inoperative in this connection by the Selective Training and Service Act of 1940,[12] hereinafter referred to as the Selective Service Act.

Sections 3 and 11 of the Selective Service Act are those which must be considered to determine the extent to which Article 2 is still operative. First considering Section 3 of the Selective Service Act, this provision may modify Article 2, but if so such modification does not render Article 2 inoperative and does not affect the result herein. Section 3 contains two provisos as follows (50 U S. C. App. Supp. I, § 303):

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[12] Plainly the Articles of War are applicable generally to all soldiers in the Army, including those who were drafted into the Army pursuant to the provisions of the Selective Training and Service Act of 1940. See *Franke* v. *Murray*, 248 Fed. 865 (C. C. A. 8); *United States* v. *Bullard*, 290 Fed. 704 (C. C. A. 2), certiorari denied, 262 U. S. 760; *United States ex rel. Bergdoll* v. *Drum*, 107 F. (2d) 897 (C. C. A. 2), certiorari denied, 310 U. S. 648, so holding under the predecessor articles containing a substantially identical Article 2 (39 Stat. 651), and the Selective Draft Act of 1917. This conclusion does not, however, preclude suspension of certain provisions of the Articles of War, pursuant to Section 16 of the Selective Training and Service Act (50 U. S. C. App., § 316) in case of inconsistency with certain provisions in the latter act.

> *Provided further,* That no citizen or subject of any country who has been or who may hereafter be proclaimed by the President to be an alien enemy of the United States shall be inducted for training and service under this Act unless he is acceptable to the land or naval forces.[13] The President is authorized from time to time, whether or not a state of war exists, to select and induct into the land and naval forces of the United States for training and service, in the manner provided in this Act, such number of men as in his judgment is required for such forces in the national interest: * * * *Provided further,* That no man shall be inducted for training and service under this Act unless and until he is acceptable to the land or naval forces for such training and service and his physical and mental fitness for such training and service has been satisfactorily determined: * * *

There is no conflict between these provisos and Article 2 and hence no modification of the latter by the former, unless "inducted" has the same meaning as becoming "subject to military law." If these terms are synonymous,[14] the effect of these

[13] Presumably this proviso, inserted after the declaration of war (Act of December 20, 1941; 55 Stat. 844), was enacted to enable the armed forces to reject enemy aliens notwithstanding the provision in Section 4 of the Selective Service Act (50 App. U. S. C. § 304) forbidding discrimination on account of race or color.

[14] Becoming "subject to military law" is one consequence of becoming a soldier in the Army; the consequential expres-

provisos is to amend Article 2 to provide that a conscript becomes subject to military law, not at the time when he is to report for induction, but when the Army, after examining him, accepts him for service. However, since the manifest purpose of the provisos is to give the armed services the right to reject all selectees whom they regard as physically or mentally unfit for service, or disloyal, it is probable that these provisos were not intended to decrease the extent of military jurisdiction over the selectees unless and until they are rejected. In this view, a selectee would become subject to military law from the moment when, responsive to the call, he arrived at the induction station[15] and would remain so unless he should be rejected. This view is more consistent with the structure of the process: the Selective Service System, a civil agency whose authority is civilly enforceable, has the function of selecting and delivering men to the armed forces for examination, acceptance or rejection by the latter; the function of Selective Service is completed when

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sion is used throughout the Articles of War; generally it would properly be construed as synonymous for draft purposes with being "inducted."

[15] Standing alone, Article 2 would subject a selectee to military law from the moment he was required to report and regardless of whether he actually did. See, however, footnote 11, *supra*, p. 13.

the men are delivered, *i. e.*, when they arrive at the induction station (Selective Service Regulations, Articles 101, 102, 601.8, 633.8, Appendix, *infra*, pp. 37–39); there the function of the armed forces begins and under their regulations the men are, by physicians selected by them, examined and then accepted or rejected (War Department Mobilization Regulations 1–7, Par. 6–13, inc.);[16] those accepted thereupon become members of the service to which they are assigned. The system thus seems to contemplate that military law attach as soon as the function of the civil agency—delivery of the men to the armed forces—has been performed. Moreover, the circumstances after the men are delivered make military law the more appropriate governing force: should a selectee then perform an act derogatory to the draft process or the armed forces, it would be anomalous if his offense were an ordinary civil wrong. Finally, only this view is consistent with the Act of October 6, 1942 (56 Stat. 770; 50 U. S. C. App. Supp. II, § 516; Appendix, *infra*, p. 41), by which Congress extended the benefits of the Soldiers' and Sailors' Civil Relief Act of 1940 to selectees from the date of receipt of the order to report to the date of

[16] A copy of War Department Mobilization Regulations 1–7 has been lodged with the clerk, together with Army Regulations 615–500, by which M. R. 1–7 was superseded.

actually reporting. The inference is clear that Congress supposed that selectees who had reported for induction were already entitled to those benefits, which means that Congress supposed they were "persons in military service" from the moment of reporting for induction.

There is, however, no occasion here to determine whether petitioner became subject to military law when he reported for induction or when the Army accepted him, for under either view he is now subject to military jurisdiction and was at the time he disobeyed his superior's order. Also, under either view he was subject to military jurisdiction when, as found by the trial court (R. 49), after his acceptance by the Army for limited service, he sought to leave the post and was prevented from doing so.

This conclusion is sound unless the word "inducted" implies acquiescence on the part of the selectee. The provision (*supra*, p. 15) authorizing the President "to select and induct into the land and naval forces of the United States for training and service, * * * such number of men as in his judgment is required" shows that the selectee's acquiescence is unnecessary for induction. The President is authorized "to select and induct." The language employed contemplates that both these acts are fully performed by the unilateral exercise of authority by the President; neither act is dependent on the will or acquiescence of the conscript. This conclusion is borne out by other provisions of the Selective

Service Act. Section 1 (b) (Appendix, *infra*, p. 35) contains a declaration that the obligations of military "service should be shared generally in accordance with a fair and just system of selective *compulsory* military training and service" [emphasis ours]. Section 3 (a) (Appendix, *infra*, pp. 35–36) provides in part that "Except as otherwise provided in this Act, every male citizen * * * between the ages of eighteen and forty-five * * * shall be *liable* for training and service in the land or naval forces of the United States" [emphasis ours]. Section 4 (a) (Appendix, *infra*, p. 36) states that selection of men shall be in an impartial manner from those "who are liable for such training and service." The effect of these provisions is plain: service in the armed forces is not volunteer service dependent on the consent of the selectee.[17] It is an obligation imposed by law. Consequently induction into the armed forces occurs regardless of the consent of the selectee and therefore is effective when the Army accepts him for service.

Article 2 and other provisions of the Articles of War have been modified and suspended, however, but in connections not here involved, by Section

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[17] In only one instance does the Selective Service Act make service contingent on the selectee's consent. The concluding proviso in Section 3 (a) (Appendix, *infra*, p. 36) states that "no man, without his consent, shall be inducted for training and service under this Act after he has attained the forty-fifth anniversary of the day of his birth."

11 of the Selective Service Act (Appendix, *infra*, pp. 36–37). This section, after detailing the actions which are made criminal in the Act, provides that "upon conviction in the district court of the United States having jurisdiction" the offender shall suffer imprisonment up to five years, fine, or both, "or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct."[18] The section then states: "No person shall be tried by any military or naval court martial in any case arising under this Act unless such person has been actually inducted * * * or unless he is subject to trial by court martial under laws in force prior to the enactment of this Act." The effect of this provision is to deprive courts martial of jurisdiction to try any person for an act which is made an offense to be tried by the civil courts under the Selective Service Act unless that person has been actually inducted into the armed forces. It thus takes away what the preceding sentence had seemed to bestow,

[18] If Section 11 said no more, the question would be presented in prosecutions for failure to report for induction whether military jurisdiction attached at the time when the selectee is required to report or whether by virtue of Section 3 (see discussion, *supra*, pp. 15–17) military jurisdiction was postponed until the armed forces had accepted the conscript. The legislative history shows (see *infra*, pp. 22–25) that members of Congress believed that the language quoted above would give military and civil courts concurrent jurisdiction over such cases and for that reason added the provision next quoted in the text.

namely jurisdiction of courts martial over the bulk of cases arising under the Act. However, resort to the legislative history of this provision is necessary in order that this effect be given it, for its meaning does not clearly appear from its language. This is so because of the saving clause ("or unless he is subject to trial by court martial under laws in force prior to the enactment of this Act"), which saves to courts martial jurisdiction conferred by laws in effect when the Selective Service Act was enacted, for under the Articles of War (Arts. 2 (a), 58 and 61; 10 U. S. C. §§ 1473 (a), 1530 and 1533) a selectee who failed to report would be a deserter and absent without leave and thus "subject to trial by court martial under laws in force prior to the enactment of" the Selective Service Act.[19] The language of the saving clause would thus, it could be argued, confer coordinate jurisdiction on civil and military courts over such offenses. The legislative history (discussed *infra,* pp. 22–25) establishes, however, that the whole purpose of the provision was to withdraw from courts martial jurisdiction over the offense of failure to report. The "unless" clause was evidently intended to save military jurisdiction over other offenses, such as those occurring after the

[19] As pointed out, *supra*, p. 14, footnote 12, it is clear that drafted soldiers are subject to the Articles of War. Thus no general exemption from the Articles of War can be found in the terms of the Selective Service Act, and the Articles of War are therefore "laws in force prior to the enactment of this Act" to which the Selective Service Act expressly defers.

selectee reported at the induction station. While this provision is effective to deprive courts martial of jurisdiction in cases such as *Bowles* v. *United States,* 319 U. S. 33, it has no effect on the case at hand. Petitioner is not held in military custody for a violation of the Selective Service Act, but for a violation of the 64th Article of War, which does not have a counterpart under the Selective Service Act. Consequently, giving its language and purpose maximum effect Section 11 has no bearing on the validity of the custody here involved.

The legislative history of this provision is the following: As originally framed, the Burke-Wadsworth bill, which became the Selective Service Act, expressly conferred on civil and military courts concurrent jurisdiction over the offense of failure to report for induction. On the Senate floor, Senator Bone introduced an amendment to substitute for the concurrent jurisdiction provision the following (86 Cong. Rec. 10895):

> Shall be tried exclusively in the district courts of the United States having jurisdiction thereof and this class of cases shall not be tried by the military and naval courts martial unless such person has been actually inducted for the training and service prescribed herein or unless he is subject to trial by court martial under laws in force prior to the enactment of this act. Cases brought under this provision shall be given preference for trial by the respective district courts.

It will be observed that this amendment was confined to "this class of cases," which the context showed was prosecution for failure to report for induction.[20] The discussion of his amendment by Senator Bone shows that he intended it to apply only to such cases, for he did not believe that "if a young man * * * fails to answer, he should be tried by a military court martial." The amendment was adopted. (86 Cong. Rec. 10895.)[21]

In conference the section into which the Senate placed the Bone amendment was redrafted into Section 11 as it now stands. The conferees retained the Bone amendment but changed its language somewhat. Evidently the change in language was not thought to change the meaning of the amendment or to enlarge its limited effect, for the statement of the House conferees was (86 Cong. Rec. 12039):

> The Senate bill provided that persons subject to the bill who fail to report for duty as ordered should be tried exclusively in the district courts of the United States and not by military and naval courts mar-

[20] The original language of this portion of the bill is set out in full in 86 Cong. Rec. 11710.

[21] An identical amendment was introduced in the House by an opponent of the bill (86 Cong. Rec. 11710) but was defeated (86 Cong. Rec. 11716), apparently because of a feeling on the part of some members that it could be used to obstruct the Selective Service process (86 Cong. Rec. 11712, 11715).

tial, unless such persons had actually been inducted for the training and service prescribed in the bill or unless they were subject to trial by court martial under laws in force prior to the enactment of the bill. The House amendment in such cases gave the courts martial and the district court concurrent jurisdiction, and made failure of persons to report for duty subject to the laws and regulations concerning that branch of the land and naval forces to which they were assigned from the date they were required by the terms of the order to obey the same, even though they had not actually been inducted.

The conference agreement contains the provisions of the Senate bill in this respect.[22]

It is evident, therefore, that giving it the optimum effect, the provision was intended to restrict the jurisdiction of courts martial as conferred by the Articles of War only as to acts made criminal by the Selective Service Act, and was

[22] The Senate conferees stated (86 Cong. Rec. 12084): "The Senate provided that draftees should be under the jurisdiction of the civil courts in the matter of violations *of this act* prior to induction for training, and thereafter to military and naval courts martial. * * * The conferees adopted the Senate provision." [Emphasis added.] This statement may suggest a less limited application than the House statement, but as it is limited to "violations of this act" it would not give the provision sufficient scope to withdraw the jurisdiction conferred by Article 2 over petitioner, since he is not being held for a violation of the Selective Service Act.

not intended to limit the jurisdiction of courts martial over other offenses proscribed by the Articles of War.

In summary, petitioner appeared for induction. He was also determined acceptable to the Army. By reason of one or the other of these circumstances he became subject to military law. Thereafter he committed an act which is an offense under the Articles of War; he is answerable therefor and is lawfully held in custody awaiting trial.[23]

II

HAVING IN ANY EVENT BECOME A SOLDIER WHEN ACCEPTED BY THE ARMY, PETITIONER BECAME SUBJECT TO MILITARY JURISDICTION BY REASON OF THAT STATUS ALONE

In Point I we have shown that military jurisdiction attached to petitioner under the Articles of War even though he be regarded as a civilian at

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[23] As the district court suggested (R. 45), it is not clear that petitioner has committed a crime under Section 11 of the Selective Service Act. His draft board ordered him to report for induction and he did everything necessary for the Army to pass on his acceptability. His disobedience was of an order authorized by military regulations, not by the Selective Service agencies. His suggestion (Br. 33) therefore, that his real offense was failure to report ready to accept induction (which if correct would place him within the possible scope of the Congressional purpose), is not well founded. Cf. *United States* v. *Collura*, (Mar. 3, 1943, S. D. N. Y.) not reported, affirmed (C. C. A. 2, December 21, 1943), not yet reported, where the selectee refused to take the physical examination.

the time the order to be fingerprinted was issued. We also contend, however, that he was already a soldier at the time. If he was, the writ of habeas corpus was properly denied since as a soldier he is in the custody of the Army charged with an offense within the military jurisdiction. *Ex parte Reed*, 100 U. S. 13; *In re Grimley*, 137 U. S. 147; *In re Morrissey*, 137 U. S. 157; *Johnson* v. *Sayre*, 158 U. S. 109.

We submit that petitioner became a soldier in the Army when the Army accepted him and that this acceptance became effective when the examining physicians, whom the Army had charged with the determination of the question whether petitioner was acceptable for service under Army standards, determined that he was acceptable for limited service. Petitioner's induction occurred then rather than when the oath was read to him. *United States ex rel. Diamond* v. *Smith*, 47 F. Supp. 607 (D. Mass.). This conclusion follows from the legislation discussed in the preceding division, *supra*, pp. 12–25, and from the controlling Army regulation.[24]

As shown above, Article 2 of the Articles of War was in effect when the Selective Service Act was enacted and is still in effect except insofar as inconsistent with that Act. Article 2 (a) con-

[24] This view is the one which the Army takes. See letter from Col. Fred W. Llewellyn, Chief, Military Affairs Section, J. A. G. D., to Maj. Bernard A. Brown, Assistant Corps Area Judge Advocate, Appendix, *infra*, p. 42 *et seq.*

templates the contingency of a draft army and provides that conscripts shall be "subject to military law" from the instant when they are required by the draft call to be present for induction.[25] This provision was copied from the superseded Articles of War (39 Stat. 650 *et seq.*) which were in effect from 1916 to 1920 and had the effect of subjecting a conscript to military law from the moment of the draft call (*Franke* v. *Murray,* 248 Fed. 865 (C. C. A. 8); *United States* v. *Bullard,* 290 Fed. 704 (C. C. A. 2), certiorari denied, 262 U. S. 760; *United States ex rel. Bergdoll* v. *Drum,* 107 F. (2d) 897 (C. C. A. 2), certiorari denied, 310 U. S. 648). The conscript was in the Army from the moment he became subject to military law, under the procedure followed in World War I.[26] Because of Section 3 of the present Selective Service Act (discussed above, pp. 15–

[25] Probably Article 2 should be read with 10 U. S. C. § 1, 30 Stat. 361 (Section 1, c. 187, Act of April 22, 1898), which states:

"All able-bodied male citizens of the United States, and persons of foreign birth who shall have declared their intention to become citizens of the United States under and in pursuance of the laws thereof, between the ages of eighteen and forty-five years, are hereby declared to constitute the national forces, and, with such exceptions and under such conditions as may be prescribed by law, shall be liable to perform military duty in the service of the United States."

[26] Section 157 of the Selective Service Regulations prescribed by the President under the Selective Draft Act of 1917 provided that from "the day and hour" specified in the draft call "such registrant shall be in the military service of the United States."

18), however, the moment when a selectee becomes a soldier is postponed until the Army has accepted him, although as we pointed out, *supra*, pp. 16–18, he may become subject to military law prior to his acceptance.

No provision of law or regulation exists which further postpones a selectee's entry into the Army. As shown above (pp. 19–25), Section 11 of the Selective Service Act has a limited effect in postponing the attachment of military law over selectees until their arrival at the induction station, because it removes offenses theretofore committed from the jurisdiction of courts martial, but it neither has nor was intended to have any effect at all on the time of induction into the Army. Its neutrality on this question affirmatively appears from its provision that a person may be tried by courts martial for violations of the Selective Service Act if "such person has been actually inducted for the training and service prescribed under this Act * * *" Plainly this provision acknowledges that one must look elsewhere to learn when one "has been actually inducted."[27]

[27] Petitioner's argument that Section 11 transforms a compulsory draft law into a volunteer service law in which a registrant has the choice of service or civil prison ignores the legislative history of Section 11. Congress intended the civil punishment provision to have merely the effect of transferring enforcement of the Act from courts martial to civil courts, not to permeate a compulsory draft law with conditions requiring the selectee's consent. Indeed, in the absence of Section 11 petitioner could as well argue that the Act makes service voluntary because it gives him the choice of service or military prison.

Neither Article 109 (Appendix, *infra*, pp. 39–40) of the Articles of War nor Army Mobilization Regulation 1–7, Par. 13e (Appendix, *infra*, p. 40), alters the conclusion that accession to soldierhood is complete when the Army accepts a selectee. By its terms[28] Article 109 applies only to men who enlist, *i. e.*, who volunteer for a fixed number of years service in the Regular Army. Moreover, when this article was enacted in 1920, the identical provisions in the predecessor Articles of War had already been construed as inapplicable to draftees, administratively in 1 Op. J. A. G. 169 (1917), and judicially in *Franke* v. *Murray*, 248 Fed. 865, 868–869 (C. C. A. 8, 1918).[29] Finally if Article 109 did apply to selectees, it would support the conclusion we urge, since it provides that every "soldier" shall take the oath and thus contemplates that the individual who is being asked to take the oath has already, at some earlier stage, become a soldier.[30] The Army Regulations do not condition a selectee's entry into the Army on his subscribing to the oath. While Mobilization Regulation 1–7, Par. 13e (Appendix, *infra*, p. 40)

[28] "At the time of his enlistment every soldier shall take the following oath or affirmation * * *"

[29] To same effect are *United States* v. *Bullard*, *supra*, and *United States ex rel. Bergdoll* v. *Drum*, *supra*, both decided between the enactment of the Articles of War and that of the Selective Service Act.

[30] See *United States ex rel. Diamond* v. *Smith*, 47 F. Supp. 607, 609 (D. Mass.): "The taking of the oath would seem to follow induction, not precede it."

suggests the thought that induction into the Army is not complete until the oath has been administered to the selectee, this suggestion is emphatically contradicted by a subsequent sentence in the same provision, the only one which deals specifically with the selectee who, like petitioner, refuses to take the oath. This sentence states insofar as pertinent:

> * * * In the event of refusal to take an oath (or affirmation) by any individual he will not be required to receive it, but will be informed that this action does not alter in any respect his obligation to the United States.[31]

Thus the Army deems the selectee to be in the Army regardless of whether he takes the oath, which is wholly consistent with the view that the selectee was in the Army even before the oath was read to him, from the moment when he proved acceptable to the Army. This view is reinforced by another aspect of the Regulation's indifference to whether the selectee takes the oath. Article 109 provides that "at the time of his enlistment every soldier shall take the * * * oath," and the fact that the regulation dispenses with this requirement where the selectee wishes it indicates the Army's belief that the administration of the

[31] On September 1, 1942, this regulation was superseded by Army Regulations No. 615–500, in which Section 13 (e) (4) is substantially identical to the superseded provision except for the extension of the provision to declarant aliens.

oath to draftees is unnecessary, though desirable as a means of bringing home to them the significance and obligations of their new status.

Certainly there is nothing inherent in the process of being drafted into the Army which requires the giving or taking of an oath. An army of approximately 4,000,000 draftees was raised during World War I without the administration of an oath to them. (See 1 Op. J. A. G. 169 (1917), holding that the oath was not necessary; see also Section 157, Selective Service Regulations (1917), providing that the draftee is in the military service of the United States automatically from the moment when his call requires him to report.) In this connection, the statute law is not substantially different now than in the last war. Article 109 of the Articles of War is in the same language, and nothing in the Selective Training and Service Act of 1940 requires or even refers to an oath. Article 2 of the Articles of War is in the same language, insofar as pertinent. The applicable Army Regulation expressly dispenses with the taking of the oath if the selectee wishes not to take it. Plainly then, the selectee's entry into the Army is not postponed to the oath but is postponed only until the condition required by Section 3 of the Selective Service Act, acceptance by the Army, is fulfilled.[32]

[32] The Selective Service Regulations are ambiguous on the point in question. Article 633.9 (Appendix, *infra*, p. 39)

III

IF NOT PREVIOUSLY, PETITIONER BECAME A SOLDIER IN THE ARMY WHEN THE OATH WAS READ TO HIM

As stated in the preceding division, we believe that petitioner became a soldier in the Army when the Army determined that he was fit for service, and that the administration of the oath has no legal significance but is entirely an extra-legal formality designed to acquaint the selectee with the significance of his status. If we are in error in this, however, as well as in our belief, discussed in the first division of this brief, *supra*, pp. 12–25, that petitioner was subject to and is properly held for a violation of military law regardless of whether he is a soldier, petitioner is nevertheless properly in respondent's custody because once the oath was read to him everything was completed which under the statutes and regulations would transform him into a soldier.

As noted above (pp. 29–31), the controlling

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seems to suggest that induction is a step apart from acceptance. On the other hand, Article 633.8 (Appendix, *infra*, p. 38) speaks of the "induction or rejection" of selectees, thus using "induction" as synonymous with "acceptance." However, the Selective Service Regulations are not the controlling administrative regulations, for the function of Selective Service ends when the selected men are presented at the induction station for acceptance or rejection by the armed forces. Examination, acceptance, induction, and rejection are all within the province of the armed forces, to be governed by their regulations, as indeed Art. 633.8 expressly recognizes. In their reference to induction these regulations are informative rather than regulatory.

regulations state that the oath shall be read to the selectee and if he refuses to subscribe to it he is to be advised that his refusal in no way affects his obligations to the United States. If we improperly interpret this regulation as showing that the oath merely emphasizes the induction which had become effective as soon as petitioner was found fit for service, then the correct interpretation of the regulation must be that the induction became effective when the oath was read to petitioner even though he refused to subscribe to it. This conclusion follows from the fact that no statute requires that the oath be given to selectees, and the oath can acquire legal significance only as the formal step marking the acceptance of the selectee by the Army although that acceptance had already occurred when the Army, through the physicians chosen to examine the selectees, had found the selectee acceptable for service.

Petitioner is therefore, as the court below held (R. 55), lawfully in the Army's custody even under this view. The fact that prior to the time when the oath was read to him he had sought to leave the post and escape the Army and was restrained from doing so, is without significance. He had no right to leave at that juncture. When he appeared for the physical examination he subjected himself to the Army's determination whether he was fit for service and he must take the

consequences of having been found acceptable. The Army could have, if it has not indeed done so, made acceptance and induction automatic upon the determination of acceptability. If it has not done so, it has not thereby lost jurisdiction to restrain the acceptable men until the formal step in acceptance has been solemnized.

CONCLUSION

For the foregoing reasons, the decision of the court below should be affirmed.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
TOM C. CLARK,
Assistant Attorney General.
ROBERT S. ERDAHL,
EDWARD G. JENNINGS,
VALENTINE BROOKES,
Special Assistants to the Attorney General.
MALCOLM A. HOFFMANN,
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JANUARY 1944.

APPENDIX

The Selective Training and Service Act of 1940, as amended (Acts of September 16, 1940, c. 720, 54 Stat. 885; Aug. 18, 1941, c. 362, 55 Stat. 626; Dec. 20, 1941, c. 602, 55 Stat. 844; Nov. 13, 1942, c. 638, 56 Stat. 1018),[33] in pertinent part provides:

> Section 1. (b) The Congress further declares that in a free society the obligations and privileges of military training and service should be shared generally in accordance with a fair and just system of selective compulsory military training and service. (50 U. S. C. App. 301 (b).)
>
> * * * * *
>
> Sec. 3. (a) Except as otherwise provided in this Act, every male citizen of the United States * * * who is between the ages of eighteen and forty-five at the time fixed for his registration, shall be liable for training and service in the land or naval forces of the United States: * * * *Provided further,* That no citizen or subject of any country who has been or who may hereafter be proclaimed by the President to be an alien enemy of the United States shall be inducted for training and service under this Act unless he is acceptable to the land or naval forces. The President is authorized from time to time * * * to select and induct into the land and naval forces of the United States for training and service, in the manner

[33] Amendments enacted after the facts of the present case arose in no way affect the pertinent provisions.

provided in this Act, such number of men as in his judgment is required for such forces in the national interest: * * * *Provided further,* That no man shall be inducted for training and service under this Act unless and until he is acceptable to the land or naval forces for such training and service and his physical and mental fitness for such training and service has been satisfactorily determined: * * * *Provided further,* That no man, without his consent, shall be inducted for training and service under this Act after he has attained the forty-fifth anniversary of the day of his birth. (50 U. S. C. App., Supp. II, 303 (a).)

* * * * *

Sec. 4. (a) The selection of men for training and service under section 3 * * * shall be made in an impartial manner, under such rules and regulations as the President may prescribe, from the men who are liable for such training and service and who at the time of selection are registered and classified but not deferred or exempted: * * *. (50 U. S. C. App., Supp. II, 304 (a).)

* * * * *

Sec. 10. (a) The President is authorized—

(1) To prescribe the necessary rules and regulations to carry out the provisions of this Act. (50 U. S. C. App. 310 (a) (1).)

* * * * *

Section 11. Any person * * * who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act * * * shall, upon conviction in the district court of the United States having

jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by any military or naval court martial in any case arising under this Act unless such person has been actually inducted for the training and service prescribed under this Act or unless he is subject to trial by court martial under laws in force prior to the enactment of this Act. * * * (50 U. S. C. App. 311.)

The Selective Service Regulations (32 C. F. R. 1941 Supp., 601.7 *et seq.*) in pertinent parts provide:

601.7. *Inducted man.*—An "inducted man" is a man who has become a member of the land or naval forces through the operation of the Selective Service System.

601.8. *Induction station.*—The term "induction station" refers to any camp, post, ship, or station at which selected men are received by the military authorities and, if found acceptable, are inducted into military service.

* * * * *

633.1. *Order to Report for Induction (Form 150).*—(a) Immediately upon determining which men are to report for induction, the local board shall prepare for each man an Order to Report for Induction (Form 150), in triplicate. * * *

* * * * * *

633.2. *Appointment of leader and assistant leader.*—(a) After selecting the registrants who are to fill the call, the local board shall designate one selected man to be the

leader of the group and one or more to be assistant leaders. * * *

* * * * * *

633.6. *Procedure before delivery.*—(a) At the time and place designated for the selected men to report for delivery, the local board shall:

(1) Call the roll of selected men.

(2) Read and issue the appointment of the leader and assistant leaders.

(3) Turn over to the leader the transportation request or tickets, the meal and lodging requests, and the records for the induction station.

(4) Notify the leader of arrangements that have been made at the induction station for the reception of the selected men.

(5) Specifically order the selected men to obey the leader and assistant leaders.

(6) Specifically order the selected men to report to the induction station.

* * * * * *

633.8. *Reception of selected men at the induction station and return of rejected men.*—In the manner and to the extent prescribed by regulations of the land or naval forces, the commanding officer of the induction station is required to have the selected men met at the railroad station or bus terminal, transported to the induction station, and provided with food and lodging after their arrival and pending their induction or rejection. In the manner and to the extent prescribed by the regulations of the land or naval forces, the commanding officer of the induction station is required to provide transportation and subsistence for the return of the selected men who have been rejected.

633.9. *Induction.*—At the induction station, the selected men found acceptable will be inducted into the land or naval forces.

As originally promulgated by the President (5 Fed. Reg., p. 3780) the Selective Service Regulations also contained the following provisions:

101. *The purpose of Selective Service.* The purpose of Selective Service is to secure an orderly, just, and democratic method whereby the military manpower of the United States may be made available for training and service in the land and naval forces of the United States, as provided by the Congress, with the least possible disruption of the social and economic life of the Nation.

102. *The processes of Selective Service.* Selective Service involves these processes: Registration, classification and selection, and delivery for induction. Registration is the process by which all males subject to registration under the selective service law are listed by name, and constitutes an inventory of manpower for military purposes. Classification and selection is the process by which the relative availability of the individual men for military service is determined, and those who are most available are selected. Induction is the process by which the men selected for military service pass from the status of civilians to the status of members of the land and naval forces of the United States.

Article 109 of the Articles of War (41 Stat. 787, 809; 10 U. S. C. 1581) provides:

At the time of his enlistment every soldier shall take the following oath or affirmation: "I, ----------, do solemnly

swear (or affirm) that I will bear true faith and allegiance to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to the Rules and Articles of War." This oath or affirmation may be taken before any officer.

The War Department Mobilization Regulations in pertinent part provided (M. R. 1-7, Par. 13e):

> Induction ceremony.—
>
> All men successfully passing the physical examination will be immediately inducted into the Army. The induction will be performed by an officer in a short, dignified ceremony in which the men are administered the oath, Article of War 109:
>
> * * * * * *
>
> They will be informed that they are now members of the Army of the United States and given an explanation of the obligations and privileges. In the event of refusal to take an oath (or affirmation) by any individual he will not be required to receive it, but will be informed that this action does not alter in any respect his obligation to the United States.

Article 2 of the Articles of War (41 Stat. 787; 10 U. S. C. § 1473) provides:

> Art. 2. The following persons are subject to these articles and shall be understood

as included in the term "any person subject to military law", or "persons subject to military law", whenever used in these articles: *Provided*, That nothing contained in this Act, except as specifically provided in Article 2, subparagraph (c), shall be construed to apply to any person under the United States naval jurisdiction unless otherwise specifically provided by law.

(a) All officers, members of the Army Nurse Corps, warrant officers, Army field clerks, field clerks Quartermaster Corps, and soldiers belonging to the Regular Army of the United States; all volunteers, from the dates of their muster or acceptance into the military service of the United States; and all other persons lawfully called, drafted or ordered into, or to duty or for training in, the said service, from the dates they are required by the terms of the call, draft or order to obey the same; * * *

* * * * * *

Act of October 6, 1942, 56 Stat. 770; 50 App. U. S. C., Supp. II, § 516:

Any person who has been ordered to report for induction under the Selective Training and Service Act of 1940, as amended (section 301 et seq. of this appendix), shall be entitled to the relief and benefits accorded persons in military service under articles I, II, and III of this Act (sections 510 et seq., and 530 et seq. of this appendix) during the period beginning on the date upon which such person reports for induction; and any member of the Enlisted Reserve Corps who is ordered to re-

[redacted]

port for military service shall be entitled to such relief and benefits during the period beginning on the date of receipt of such order and ending on the date upon which he reports for such service.

Letter from Chief, Military Affairs Section, Judge Advocate General's Division:

JUNE 6, 1941.

Military Affairs
JAG 327.36

Major BERNARD A. BROWN,
Assistant Corps Area Judge Advocate,
Seventh Corps Area,
Omaha, Nebraska.

DEAR MAJOR BROWN: There has been referred to this section for reply your letter to Lieutenant Colonel Loren F. Parmley, J. A. G. D., dated May 26, 1941, which relates to the status of Jesus Ramirez, Selectee, Fort Francis E. Warren, Wyoming, a prisoner awaiting trial by court martial for failing to obey a lawful command to put on his uniform.

The specific question presented is set forth in the letter mentioned as follows:

"Does the 'administration' of the oath, the acceptance of which was refused by selectee, constitute 'induction'?"

The Selective Training and Service Act of 1940 (Public, No. 783, 76th Cong.) contains no provision which expressly stipulates when a selectee is to be regarded as having been inducted. For this reason, the determination of this question must be made in the light of the applicable regulations which have been promulgated pursuant to that act. Pertinent extracts from those regulations (MR 1-7, par. 13e; SSR,

par. 429) are set forth in your letter, and after due consideration of these, together with the applicable statutory provisions, you reach the following conclusions:

"1. That the only purpose of the administration of the oath as set out in MR 1–7, Paragraph 13e, is for the purpose of informing the individual of his obligations and responsibilities to the United States of America, and his acquiescence in, or acknowledgment of this obligation, by some overt act indicating acceptance thereof is immaterial.

"2. That induction is complete immediately upon full acceptance of the individual by the government. The oath or any act or requirement thereafter is ministerial only and is not necessary to the completion of induction.

"3. For induction no acquiescence or acceptance on the part of the individual is required."

Generally speaking, the above-quoted conclusions are believed to be sound, and it therefore follows that a refusal on the part of a selectee to take the prescribed oath does not legally affect the validity of his induction.

Yours very truly,

FRED W. LLEWELLYN,
Colonel, J. A. G. D.,
Chief, Military Affairs Section.

U. S. GOVERNMENT PRINTING OFFICE: 1944

SUPREME COURT OF THE UNITED STATES.

No. 215.—October Term, 1943.

Arthur Goodwyn Billings, Petitioner, vs. Karl Truesdell, Major General, United States Army.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[March 27, 1944.]

Mr. Justice Douglas delivered the opinion of the Court.

Sec. 11 of the Selective Training and Service Act of 1940 (54 Stat. 894, 50 U. S. C. App. § 311) provides that "No person shall be tried by any military or naval court martial in any case arising under this Act unless such person has been actually inducted for the training and service prescribed under this Act or unless he is subject to trial by court martial under laws in force prior to the enactment of this Act."[1] Petitioner Billings, who is held by the Army on a charge of a violation of the Articles of War, claims that this provision of the Act exempts him from military jurisdiction and makes him responsible solely to the civil authorities. The answer turns on whether or not Billings has been "actually inducted" into the Army. These are the facts.

Billings claims to be a conscientious objector. He registered under the Act with Local Board No. 1 of Ottawa County, Kansas, stating on his card at the time that he would never serve in the Army. He was given a 1-B classification because of defective eyesight but was reclassified as 1-A in January, 1942. The local board rejected his claim that he was a conscientious objector. He appealed to the board of appeal which affirmed the ruling of the

[1] Sec. 11 so far as material here provides: "Any person . . . who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act . . . shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by an military or naval court martial in any case arising under this Act unless such person has been actually inducted for the training and service prescribed under this Act or unless he is subject to trial by court martial under laws in force prior to the enactment of this Act."

local board. Though petitioner resolved never to serve in the Army, he desired to comply with all of the requirements of Selective Service short of actual induction, so that he might avoid all civil penalties possible. Accordingly, he consulted with draft officials in Texas and faculty members at the University of Texas where he taught and, concluded that taking the oath was a prerequisite to induction into the armed forces. He thought he might be finally rejected by the Army on account of defective eyesight. But he resolved that if he was not rejected at the induction station, he would not take the oath but would turn himself over to the civil authorities. He was ordered by his local board to report on August 12, 1942 and to proceed to the induction center at Fort Leavenworth. He joined the group selected for induction and was transported to Fort Leavenworth where he and the others in his group spent the night in the barracks. The next morning after breakfast in the mess hall petitioner was given both the physical and mental examinations during which he made clear to the examining officials his purpose not to serve in the Army. He then reported to the officer who passed on the results of the examinations and who told him that he had been put in Class 1-B. He then reported to the induction office and told the officers in charge that he refused to serve in the Army and that he wanted to turn himself over to the civil authorities. They said that he was already under the jurisdiction of the military and put him under guard to prevent him from leaving the reservation. With their consent, however, he used the telephone and procured the services of an attorney whom he retained to file a petition for *habeas corpus* on his behalf. Thereupon an Army officer read petitioner the oath of induction which petitioner refused to take. He was advised that his refusal made no difference, that "You are in the army now." He was then ordered to submit to finger-printing. He refused to obey. Military charges were preferred against him for willful disobedience of that order.

On August 14, 1942, petitioner filed this petition for a writ of *habeas corpus* alleging that he was not a member of the armed forces of the United States, that he was not subject to military jurisdiction, and that if he had violated any laws they were the civil laws of the United States. The writ issued. Respondent filed a return and a hearing was had at which petitioner testified. The District Court discharged the writ and remanded petitioner to respondent's custody, holding that petitioner was subject to mili-

tary jurisdiction. 46 F. Supp. 663. The Circuit Court of Appeals affirmed, holding that "Induction was completed when the oath was read to petitioner and he was told that he was inducted into the Army." 135 F. 2d 505, 507. The case is here on a petition for a writ of certiorari which we granted because of the importance of the problem in the administration of the Act.

I.

It is conceded that petitioner was not "actually inducted" in the Army within the meaning of § 11 of the Act when he was ordered to report to the induction station. But it is contended that from that time on he was subject to at least a limited military jurisdiction by reason of the Articles of War.

Among those whom Article 2 of the Articles of War (41 Stat. 787, 10 U. S. C. § 1473) subjects to military law are all persons "lawfully called, drafted, or ordered into, or to duty or for training in, the said service, from the dates they are required by the terms of the call, draft or order to obey the same." This provision standing alone would have made petitioner subject to military law from August 12, 1942, the date when he was required by the local board to present himself for induction. That was indeed the consequence under the Selective Draft Act of 1917 (40 Stat. 76). *Franke* v. *Murray*, 248 Fed. 865; *United States* v. *Bullard*, 290 Fed. 704; Digest Op. J. A. G. 1912-1930, Sec. 2238; 2 Op. J. A. G. (1918) 327.3; Second Report, Provost Marshal General (1918), p. 221. The Articles of War then in force (39 Stat. 651) had substantially the same provision as the present Article 2. Sec. 2 of the 1917 Act provided, moreover, that "All persons drafted into the service of the United States . . . . shall, from the date of said draft or acceptance, be subject to the laws and regulations governing the Regular Army . . . ." 40 Stat. 78. And the regulations under the 1917 Act stated that when a registrant was ordered to report to a local board or a state adjutant general for duty he was "in the military service" from and after the day and hour thus specified. §§ 133, 159D, 159E, 159F, 159G, 161. And see *United States* v. *McIntyre*, 4 F. 2d 823. But the present Act and the regulations promulgated under it are differently designed.

Sec. 3 of the Act provides that "no man shall be inducted for training and service under this Act unless and until he is acceptable to the land or naval forces for such training and

service and his physical and mental fitness for such training and service has been satisfactorily determined." Moreover, as we have noted, Congress by § 11 withheld from military courts martial jurisdiction over cases arising under the Act unless the person involved had been "actually inducted" or "unless he is subject to trial by court martial under laws in force prior to the enactment of this Act." The "actually inducted" clause of § 11 was offered as an amendment on the floor of the Senate by Senator Bone. 86 Cong. Rec. 10895. It was designed, as stated by the Senate conferees, to give civil courts jurisdiction over violations of the Act prior to induction for training in substitution for the House provisions that civil and military courts should have concurrent jurisdiction in such cases. 86 Cong. Rec. 11710, 12039, 12084. In view of this legislative history the Congress can hardly be presumed to have restored by the second "unless" clause in § 11 what it took away by the first "unless" clause. That is to say, § 11 of the Act read together with § 3 indicates to us a purpose to vest in the civil courts exclusive jurisdiction over all violations of the Act prior to actual induction. It is suggested, however, that prior to that time a selectee may be subject to military jurisdiction by reason of Art. 2 of the Articles of War and be prosecuted before courts martial for all offenses proscribed by the Articles, provided those acts are not made criminal by the Act. Under that view a selectee who failed to report for induction (*Bowles* v. *United States*, 319 U. S. 33) or who having reported, refused to be examined (*United States* v. *Collura*, 139 F. 2d 345) could be prosecuted for such offenses only in civil courts. § 11. But since by Art. 2 he became a soldier when ordered to report, he could be prosecuted by the military for those offenses which were proscribed by the Articles of War but not by the Act.

We think that is too narrow a reading of § 11 of the Act. As we pointed out in *Falbo* v. *United States*, 320 U. S. 549, 552, the mobilization program established by the Selective Service System is designed to operate "as one continuous process for the selection of men for national service"—a process in which the civil and military agencies perform integrated functions. The examination of men at induction centers and their acceptance or rejection are

parts of that process. Induction marks its end. But prior to that time a selectee is still subject to the Act and not yet a soldier. A case involving his rights or duties as a selectee prior to that event is a case arising under the Act. The civil authorities not the military are charged with the duties of enforcement at that stage of the process. That necessarily means that the measure of a selectee's rights and duties is to be found in the Act not in the Articles of War. For § 16(a) of the Act suspends all laws or parts thereof which are in conflict with its provisions.

We are supported in that view by the administrative construction of the Act. The regulations promulgated under it define a "delinquent" as one who is "liable for training and service" under the Act and "who fails or neglects to perform any duty required of him" by the Act or the regulations made pursuant thereto. § 601.5 And Part 642, which contains detailed provisions concerning the rights and duties of "delinquents", provides: "Every registrant who has heretofore or who hereafter fails to comply with an Order to Report for Induction or an Order to Report for Work of National Importance shall be reported promptly to the United States Attorney . . . ; provided that if the local board believes that by reasonable effort it may be able to locate the registrant and secure his compliance, it may delay the mailing of such Delinquent Registrant Report for a period not in excess of 30 days." § 642.41(a). Moreover, § 642.42(a) provides: "After a delinquent has been reported to the United States Attorney, it is the responsibility of the United States Attorney to determine whether he shall be prosecuted. Before permitting such a delinquent to be inducted or assigned to work of national importance, the local board should obtain the views of the United States Attorney concerning such action." We will develop shortly the place of such regulations in the Selective Service System. It is sufficient at this point to note that the regulations treat the problems of "delinquents" as matters exclusively for the civil authorities.[2] We cannot believe that the Act would have been given that construction if, as is now contended, the selectee became subject to even a limited military jurisdiction prior to induction.

[2] While the regulations governing "delinquents" cited in the text are those presently in force, the ones in effect at the time of Billings' refusal to be inducted were of the same tenor and were then included in § 601.5, § 642.4, § 642.5.

It should also be noted that these regulations contain detailed provision for the parole of persons convicted of violations of the Act. §§ 643.1 *et seq.*

II.

Respondent argues in the second place that petitioner became a soldier when the Army accepted him after his examinations were completed. That argument is based largely on the War Department Regulations.

The War Department Regulations[3] in force in August, 1942 (Mobilization Regulations No. 1-7, October 1, 1940) provided in Sec. II, par. 6, that "The function of the induction station is to provide the final examinations for registrants selected for induction and the induction of those acceptable to the Army." Sec. II, par. 13(e), entitled "induction ceremony" provided: "All men successfully passing the physical examination will be immediately inducted into the Army. The induction will be performed by an officer in a short, dignified ceremony in which the men are administered the oath, AW 109: 'I, _____, do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to the rules and Articles of War.' They will be informed that they are now members of the Army of the United States and given an explanation of their obligations and privileges. In the event of refusal to take an oath (or affirmation) by any individual he will not be required to receive it, but will be informed that this action does not alter in any respect his obligation to the United States."

The argument is that since the Army Regulations do not condition a selectee's entry into the Army on his subscribing to the oath,[4] induction must take place at some anterior point of time. It

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Those required to register under the Act may be paroled by the Attorney General on the recommendation of the Director of Selective Service for induction or for other assignments. § 643.2. The Attorney General has the power to impose "such terms and conditions as he may deem proper" upon the parolee and shall supervise him, and may suspend or revoke the parole, except when the parolee is "in the active land or naval forces of the United States." §§ 643.8, 643.9. And Army Regulations No. 615-500, Sec. II, par. 7(b)(5) provide that registrants convicted of violation of the Act "will be accepted for induction at any time," provided the Attorney General of the United States has granted parole "for the purpose of induction."

[3] These were superseded September 1, 1942, by Army Regulations No. 615-500.

[4] The case of a selectee is distinguished from that of an enlistee who is required by Art. 109 of the Articles of War to take the oath. Identical requirements in the predecessor Articles of War applicable to enlistees were construed as inapplicable to draftees under the Selective Draft Act of 1917. See 1 Op. J. A. G. 169 (1917); Franke v. Murray, *supra*, pp. 868-869.

is said that while § 3 of the Act provides that a selectee shall not be inducted "until he is acceptable" to the Army, there is nothing in the Act which postpones induction beyond that time. The induction ceremony described in Sec. II, par. 13(e) of the regulations is said to be a formal exercise which solemnifies the occasion and during which the soldier is advised concerning his obligations and responsibilities to the United States. See *United States* v. *Smith*, 47 F. Supp. 607. The statement in Sec. II, par. 13(e) that those who pass the examination "will be immediately inducted into the Army" is read to mean that selectees shall thereupon be accepted as soldiers. A statement by an officer in authority that they are accepted, followed by the reading of the oath and such other explanation as may be required completes the ceremony.

That view finds support in informal rulings of the Judge Advocate General's office.[5] And War Department Regulations have the force of law as we recently had occasion to reaffirm in *Standard Oil Co.* v. *Johnson*, 316 U. S. 481, 484.

But that circumstance is complicated here by the division of jurisdiction between the civil and military authorities which the Act creates. The President is authorized "to select and induct" men into the armed forces "in the manner provided in this Act". § 3(a). No man shall be "inducted for training and service under this Act unless and until he is acceptable" to the armed services. § 3(a). And the civil authorities retain jurisdiction over him until he is "actually inducted". § 11. Thus it seems clear, as we have already said, that the Act, rather than the War

[5] The following propositions were submitted to the Chief, Military Affairs Section of the Judge Advocate General's office: "1. That the only purpose of the administration of the oath as set out in MR 1-7, Paragraph 13e, is for the purpose of informing the individual of his obligations and responsibilities to the United States of America, and his acquiescence in, or acknowledgment of this obligation, by some overt act indicating acceptance thereof is immaterial. 2. That induction is complete immediately upon full acceptance of the individual by the government. The oath or any act or requirement thereafter is ministerial only and is not necessary to the completion of induction. 3. For induction no acquiescence or acceptance on the part of the individual is required."

On June 6, 1941, the following informal ruling was made: "Generally speaking, the above-quoted conclusions are believed to be sound, and it therefore follows that a refusal on the part of a selectee to take the prescribed oath does not legally affect the validity of his induction." We are advised by the Judge Advocate General on February 4, 1944, in a supplemental memorandum filed by the Solicitor General that although that opinion was expressed informally by letter and not in a formal opinion it "represented the views of The Judge Advocate General" and that those views "have not been modified and are hereby adhered to."

Department Regulations or the Articles of War, determines the rights and duties of selectees, as distinguished from inducted men. The manner and method of effecting an induction into the Army are thus left for the War Department. But the power of the President under the Act "to select and induct" men includes the power to determine when the selective process is completed. It is only after that process is finished that a selectee is eligible for induction.

That view runs throughout the Selective Service Regulations promulgated under the Act. They are the regulations which have special relevancy here. The rule-making power under the Act is vested in the President. § 10(a)(1). The President in turn is given the power to delegate that authority.[6] § 10(b). And during the period here in question, as at the present time,[7] the President had delegated it to the Director of Selective Service. Exec. Order, No. 8545, Sept. 23, 1940, 5 Fed. Reg., pp. 3779, 3781. The Act and the regulations promulgated under it give the selective process its integrated nature. *Falbo* v. *United States, supra.* They determine the role which the military as well as the civilian authorities are to play in the administrative process of selection. *Id.* As in other instances (*United States* v. *American Trucking Ass'ns,* 310 U. S. 534, 549; *Gray* v. *Powell,* 314 U. S. 402) the interpretations of an Act of Congress by those charged with its administration are entitled to persuasive weight.

As we have said, the Selective Service Regulations support our interpretation of the Act. Thus it is provided that while a selectee is appealing or otherwise contesting his classification, his induction shall be stayed. §§ 625.3, 626.14, 627.41, 628.7. And, as we have noted, when a "delinquent" has been reported to a United States Attorney, the local board shall not order him to report for induction without obtaining the views of the United States Attorney. These provisions, as well as those governing the control of the local boards over the orders to report for induction, which we will come to shortly, are framed on the theory that the time when a selectee's status may change from civilian to soldier

[6] Sec. 10(b) as originally enacted contained no limitation as to the persons to whom that authority might be delegated. But by the Act of December 5, 1943, 57 Stat. 598, § 10(b) was amended to read: "The President is authorized to delegate to the Director of Selective Service only, any authority vested in him under this Act (except section 9)."

[7] See Exec. Order No. 9410, December 23, 1943, 8 Fed. Reg. 17319.

is subject to the terms and requirements of the Act. Thus they confirm our construction of the Act.

The Selective Service Regulations also draw a distinction between acceptance (or being found acceptable) by the Army and induction. During the period here in question an inducted man was defined as "a man who has become a member of the land or naval forces through the operation of the Selective Service System." 32 Code Fed. Reg. 1941 Supp. § 601.7. Induction station was defined as any camp, etc. "at which selected men are received by the military authorities and, if found acceptable, are inducted into military service." § 601.8. And though the regulation governing the reception of selected men at the induction station referred to their treatment "pending their induction or rejection" (§ 633.8), "induction" was not otherwise used in the sense of "acceptance". For it was defined in the very next regulation in the following manner: "Induction. At the induction station, the selected men found acceptable will be inducted into the land or naval forces." § 633.9.

These regulations thus suggest that induction follows acceptance and is a separate process. Read in that light the War Department Regulations may be reconciled with the regulations under the Act. For as we have seen, the War Department provided by regulation at the time Billings appeared at Fort Leavenworth that the "induction *will be performed* by an officer in a short, dignified ceremony in which the men are administered the oath", etc. (Italics added.)

We are confirmed in this conclusion by recent amendments both to the Army Regulations and to the Selective Service Regulations. The Army Regulations, as amended March 30, 1943, now state respecting the "induction ceremony", that "The induction will be performed by an officer who, prior to administering the oath, will give the men *about to be inducted* a short patriotic talk" (italics added). This makes unambiguous the fair inference in the earlier Army Regulations that selectees were inducted *by* the ceremony and not before it.

Moreover, the Selective Service Regulations have been amended in recent months so as to provide for preinduction physical examinations before a registrant "is ordered to report for induction." § 629.1. As under the former regulations, the group to be forwarded for examination by the military authorities is assembled by the local board and given certain instructions and credentials.

§ 629.22. Registrants in certain classes "may be inducted into service at the induction station upon being found qualified for service", provided they make written request of their boards and provided there is no appeal pending in their cases and the appeal period has expired. § 629.23. All other registrants who are given the preinduction examination are returned to their local board when the examination is completed. § 629.22(e). Those found acceptable by the Army or Navy are later ordered to report for induction. §§ 632.1 *et seq.* Local boards, in filling calls received, are authorized to allow twenty-one days before induction to those who "have been found to be acceptable to the Army." § 632.4. This takes the place of the earlier system whereby selectees were first inducted and then given, if they desired, furloughs to attend to their personal affairs. Army Reg. No. 615-500, September 1, 1942, Sec. II, par. 16.

We mention these recent regulations because they perpetuate the distinction between acceptance or being found acceptable and induction which appeared in the regulations when Billings reported at the induction station. That these amendments do not effect any change in the concept of "induction" is apparent from the fact that its definition has remained practically the same from the time when Billings reported at the induction station to the present time.[8] It could hardly be maintained that a selectee who has passed his preinduction physical examination but who has not been ordered to report for induction is subject to military jurisdiction. And it would not seem permissible to hold that he who failed to report for induction at the end of the so-called twenty-one day furlough period could be prosecuted by a court martial because he had been "actually inducted" within the meaning of § 11. But if that is true, it is difficult to see why there would be a difference in result if the interval between the time when he is found acceptable or is accepted and the ceremony of induction were only a few minutes, as in the present case, rather than a few weeks.

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[8] As we have indicated the Selective Service Regulations in § 633.9 defined "induction" at the time Billings reported to the induction station as follows: "At the induction station, the selected men found acceptable will be inducted into the land or naval forces." At the present time § 633.25 defines "induction" as follows: "At the Army Reception Center, the Navy Recruiting Station, or the induction station, as the case may be, the selected men who have been forwarded for induction and found acceptable will be inducted into the land or naval forces."

III.

It is finally contended, as the Circuit Court of Appeals held, that petitioner was inducted when the oath was read to him and he was told that he was in the Army. At that time he had been placed under guard and was retained against his will. But the argument is that the military has authority to exercise force for the purpose of inducting selectees into the service.

We have no doubt of the power of Congress to enlist the manpower of the nation for prosecution of the war and to subject to military jurisdiction those who are unwilling, as well as those who are eager, to come to the defense of their nation in its hour of peril. *Arver* v. *United States*, 245 U. S. 366. But Congress did not choose that course in the present emergency. It imposed a separate penalty on those who defied the law—prosecution by the civil authorities and a maximum penalty of five years imprisonment or a $10,000 fine or both. § 11. We say that that penalty was aimed at those who defied the law, though in the words of § 11 it includes, of course, only those who have not been "actually inducted". But we give "inducted" the meaning it has in the Act and in the regulations. As we have pointed out, an inducted man is defined by the Selective Service Regulations as one "who has become a member of the land or naval forces through the operation of the Selective Service System." § 601.7. That suggests that he becomes "actually inducted" within the meaning of the Act by submitting to the Selective Service System. The fact that he is not a volunteer is, of course, irrelevant as the Act was designed as a "fair and just system of selective compulsory military training and service." § 1(b). But induction under the Act and the present regulations is the end product of submission to the selective process and compliance with the orders of the local board.

It must be remembered that § 11 imposes on a selectee a criminal penalty for any failure "to perform any duty required of him under or in the execution" of the Act "or rules or regulations made pursuant thereto." He who reports to the induction station but refuses to be inducted violates § 11 of the Act as clearly as one who refuses to report at all. *United States* v. *Collura*, *supra*. The order of the local board to report for induction includes a command to submit to induction. Though that

command was formerly implied,[9] it is now express. The Selective Service Regulations state that it is the "duty" of a registrant who receives from his local board an order to report for induction "to appear at the place where his induction will be accomplished", "to obey the orders of the representatives of the armed forces while at the place where his induction will be accomplished", and "to submit to induction". § 633.21(b). Thus it is clear that a refusal to submit to induction is a violation of the Act rather than a military order. The offense is complete before induction and while the selectee retains his civilian status. That circumstance throws light on the meaning of the words "actually inducted" as used in § 11 of the Act. Congress by accepting the Bone amendment to § 11 specified the maximum penalty to be imposed on those who violated the Act or disobeyed an order of their board prior to their induction.[10] It also withheld from military courts jurisdiction over those offenders. At the same time Congress did not authorize the Army to search out delinquents wherever they might be and induct them without more. We must therefore assume that Congress as a matter of policy decided that those who disobeyed the order of their board and refused to be inducted were to be punished by the civil authorities and by them alone.[11] If forcible seizure or detention of such offenders by the Army were sanctioned, the Congressional policy

[9] See §§ 633.1, 633.2, 633.6 in force in August, 1942.

[10] The Conference Report stated: "The Senate bill provided that persons subject to the bill who fail to report for duty as ordered should be tried exclusively in the district courts of the United States and not by military and naval courts martial, unless such persons had actually been inducted for the training and service prescribed in the bill or unless they were subject to trial by court martial under laws in force prior to the enactment of the bill. The House amendment in such cases gave the courts martial and the district courts concurrent jurisdiction, and made failure of persons to report for duty subject to the laws and regulations concerning that branch of the land and naval forces to which they were assigned from the date they were required by the terms of the order to obey the same, even though they had not actually been inducted.

"The conference agreement contains the provisions of the Senate bill in this respect." 86 Cong. Rec. 12039.

[11] It is true that for other purposes Congress has treated selectees who are ordered to report for induction the same as those in military service. Thus the benefits of the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U. S. C. App. § 501, 54 Stat. 1178), which originally obtained only to "persons in the military service", were extended by an Act of October 6, 1942, to selectees from the date of receiving an order to report until the time of actually reporting for induction. 50 U. S. C. App. Supp. II, § 516, 56 Stat. 770. But, as we have pointed out, the Selective Service Act and the regulations under it have not made the selectee's civilian status change to that of soldier at either point of time.

of providing the maximum punishment for their delinquency would be undermined.

Moreover, it should be remembered that he who reports at the induction station is following the procedure outlined in the *Falbo* case for the exhaustion of his administrative remedies. Unless he follows that procedure he may not challenge the legality of his classification in the courts. But we can hardly say that he must report to the military in order to exhaust his administrative remedies and then say that if he does so report he may be forcibly inducted against his will. That would indeed make a trap of the *Falbo* case by subjecting those who reported for completion of the Selective Service process to more severe penalties than those who stayed away in defiance of the board's order to report.

These considerations together indicate to us that a selectee becomes "actually inducted" within the meaning of § 11 of the Act when in obedience to the order of his board and after the Army has found him acceptable for service he undergoes whatever ceremony or requirements of admission the War Department has prescribed.

We are not concerned with the wisdom of either the "actually inducted" clause in § 11 or the procedure for selection and induction which has been prescribed under the Act. Nor is it for us to decide whether the maximum penalty provided by Congress is adequate for those who flout the Act while the nation fights for its very existence. But where Congress has drawn the line between civil and military jurisdiction it is our duty to respect it.

Reversed.

Mr. Justice ROBERTS is of the view that the judgment should be affirmed for the reasons stated in the opinion of the Circuit Court of Appeals, 135 F. 2d 505.

Mr. Justice FRANKFURTER.

Under the Selective Service Act of 1940 unlike that of 1917, a selectee is not subject to trial by a military court martial until he has been "actually inducted" for training and service. But Congress did not define when he was so "inducted". It thus left to judicial construction when the civilian status ceased and the

military status began. In a matter of this sort, involving as it does the process of compulsory recruiting of the nation's Army in the midst of war, it is of vital importance that the line be drawn as definitely as the legislation reasonably permits in order that ambiguity and controversy be reduced to a minimum.

In the *Falbo* case we held the other day that "The connected series of steps into the national service which begins with registration with the local board does not end until the registrant is accepted by the army . . . ." 320 U. S. 549, 553. The line that was thus drawn—when "the connected series of steps" has ended—seems to me to be the line to draw between the civil and military status of a registrant. In other words, when acceptance of a registrant is communicated by the Army, the Army has made its choice. The man is then in the Army. Such was the ruling, and I believe the correct ruling, of the court below. 135 F. 2d 505. According to the Court's opinion, as I understand it, the Act itself does not draw this line but Congress has authorized such a line to be drawn by appropriate regulations. On that assumption, I do not dissent.